

**Oregon State Bar**  
**Meeting of the Board of Governors**  
September 11, 2015  
**Open Session Minutes**

The meeting was called to order by President Richard Spier at 12:30 p.m. on September 11, 2015. The meeting adjourned at 3:10 p.m. Members present from the Board of Governors were James Chaney, Guy Greco, R. Ray Heysell, Theresa Kohlhoff, John Mansfield, Audrey Matsumonji, Vanessa Nordyke, Per Ramfjord, Kathleen Rastetter, Joshua Ross, Kerry Sharp, Michael Levelle, Charles Wilhoite, Timothy Williams and Elisabeth Zinser. Not present were Ramon A. Pagan and Travis Prestwich. Staff present were Sylvia Stevens, Helen Hirschbiel, Rod Wegener, Dawn Evans, Kay Pulju, Susan Grabe, Mariann Hyland, Dani Edwards, Kateri Walsh, Charles Schulz, and Camille Greene. Also present was Carol Bernick, PLF CEO; Robert Newell, PLF BOD; Karen Clevering, ONLD Chair, and Jovita Wang, ABA YLD Delegate.

**1. Report of Officers & Executive Staff**

**A. Report of the President**

As written. Mr. Spier informed the board of the nominating process for the 2016 President-elect. The nominating committee will present their recommendation to the board at the October 9, 2015 special open session.

Mr. Spier asked the board to approve the new executive director's contract.

**Motion:** Mr. Mansfield moved, Mr. Heysell seconded, and the board voted unanimously to approve the contract as presented.

**B. Report of the President-elect**

Mr. Heysell reported on the August meeting of the National Conference of Bar Presidents, including a thought-provoking roundtable discussion entitled "Disruptive Innovators."

**C. Report of the Executive Director**

As written. Ms. Stevens also updated the board on the staff visits to several section executive committee meetings to discuss changes to section CLEs. She told the board to expect the report of the Knowledge Base Task Force in November. Ms. Stevens also announced that she will retire as a PERS employee on November 30, 2015 and work as a non-PERS employee for the month of December.

**D. Director of Regulatory Services**

Ms. Evans reported on staff changes in Regulatory Services due to Mary Cooper's retirement and Linn Davis' promotion.

**E. Director of Diversity & Inclusion**

Ms. Hyland reported that Christopher Ling was hired to fill the Diversity & Inclusion Coordinator position. OLIO was successfully held in Hood River last month and their BOWLIO event will take place in November. The online version of the Diversity Storywall went live this week.

#### **F. MBA Liaison Reports**

Ms. Kohlhoff reported that she updated the MBA Board on September 2, 2015 and answered questions about the bar's financial picture.

#### **G. Oregon New Lawyers Division Report**

In addition to the written report, Ms. Clevering reported on the ONLD's cruise which was well-attended by law-student liaisons and judges. ONLD won 2nd place for the ABA YLD Member Services Award for their loan repayment resources on the ABA webpage. The ONLD anti-bias rule resolution was tabled at the ABA Annual meeting, pending the ABA's standing committee on ethics makes a further proposal. ONLD would like to work with the BOG on ABA YLD suggestions for rural lawyers.

### **2. Professional Liability Fund**

Ms. Bernick reported on the PLF bi-annual defense panel conference, including a compliment from one attendee about the excellent job the PLF is doing in getting younger lawyers trained up to try cases as first chair. The PLF leads in this area.

Ms. Bernick presented the proposed 2016 PLF Budget and Annual Assessment. The budget includes a 3% salary pool and continues the \$200,000 contribution to BarBooks; there is no change in the assessment for 2016. **[Exhibit A]**

**Motion:** Mr. Mansfield moved, Ms. Matsumonji seconded, and the board voted unanimously to approve the budget and assessment as presented.

Ms. Bernick reported on and asked the board to approve minor changes to the 2016 PLF Primary, Excess and ProBono Coverage Plans. **[Exhibit B]**

**Motion:** Ms. Zinser moved, Mr. Wilhoite seconded, and the board voted unanimously to approve the coverage plans as presented.

Ms. Bernick presented the June 30, 2015 PLF Financial Statements. The BOG complimented her on the clarity of the statements.

### **3. OSB Committees, Sections and Councils**

#### **A. MCLE Committee**

Ms. Hirschbiel asked the board to consider the request of the committee to amend the MCLE Rules and Regulations to clarify the accreditation criteria for child and elder abuse reporting programs. **[Exhibit C]**

**Motion:** Mr. Greco moved, Mr. Heysell seconded, and the board voted unanimously to approve the committee recommendation.

Ms. Hirschbiel asked the board to consider the request of the committee to eliminate the "accredited sponsor" category, reciprocal accreditation, and the requirement that applications

be reviewed within 30 days. These changes are designed to add clarity, and simplify the accreditation process, especially in light of the new association management software.

**[Exhibit D]**

**Motion:** Mr. Greco moved, Ms. Nordyke seconded, and the board voted unanimously to approve the committee recommendation.

**B. Ethics Committee**

Ms. Hirschbiel asked the board to consider the request of the committee to adopt the proposed amendments to several formal ethics opinions. **[Exhibit E]**

**Motion:** Mr. Levelle moved, Ms. Matsumonji seconded, and the board voted unanimously to approve the revised opinions.

**4. BOG Committees, Special Committees, Task Forces and Study Groups**

**A. Appellate Screening Special Committee**

Mr. Ross reviewed the process for the two current vacancies. The application process closes today. They expect approximately 40 applications and are formulating the interview questions. Former Chief Judge Mary Dietz is working with the committee on the process this year.

**B. Awards Special Committee**

Mr. Spier presented the committee's recommendations for awards recipients. **[Exhibit F]**

**Motion:** Mr. Greco moved, Ms. Zinser seconded, and the board voted unanimously to approve the committee's recommended awards recipients.

**C. Board Development Committee**

Ms. Matsumonji presented the committee's recommendations for appointments to the PLF Board of Directors: Public Member Tom Newhouse and Attorney Appointment Molly Jo Mullen.

**Motion:** The board voted unanimously to approve the committee motion on recommended PLF appointments.

Ms. Matsumonji informed the board on the committee's discussion about nominating members for the Board of Bar Examiners. The committee has concerns about the lack of practice area diversity and also about reappointment for multiple terms. Rather than nominate candidates this year, the Committee recommends informing the BBX of its concerns going forward.

**[Exhibit G]**

**Motion:** Mr. Ross moved, Mr. Sharp seconded, and the board voted unanimously to approve the letter from Mr. Spier to the BBX regarding nomination of board members.

**D. Budget and Finance Committee**

Ms. Kohlhoff gave a general committee update and opened discussion about 2016 member fees. The committee will make a specific recommendation regarding 2016 member fees to the board at the October 9, 2015 special open session.

**E. Governance and Strategic Planning Committee**

Mr. Heysell asked the board to consider the proposed revisions to the bar's Fee Arbitration Rules. The revisions re-name the Fee Arbitration Rules as the Fee Dispute Resolution Rules, and create a permanent Fee Mediation Program at the bar. **[Exhibit H]**

**Motion:** The board voted unanimously to adopt the Fee Dispute Resolution Rules, with the correction of the \$7,500 to \$10,000 in Rule 4.5.

Mr. Heysell asked the board to consider the committee recommendation that all board members be issued board email addresses, effective January 1, 2016, to conduct board business.

**Motion:** The board voted unanimously in favor of issuing OSB email addresses to BOG members for use in connection with BOG business.

Mr. Heysell asked the board to consider the committee recommendation that the Executive Director's title be changed to Chief Executive Officer/Executive Director effective January 1, 2016, with the understanding that "Executive Director" will be dropped as soon as the Bar Act references can be changed.

**Motion:** The board voted unanimously to change the Executive Director's title to Chief Executive Officer/Executive Director.

Mr. Heysell asked the board to consider the committee recommendation to approve a new pro bono program to provide online pro bono services which should be particularly helpful to clients in remote areas and will provide more opportunities for lawyers. **[Exhibit I]**

**Motion:** The board voted unanimously to approve the committee motion.

**F. Public Affairs Committee**

Mr. Mansfield and Ms. Grabe updated the board on the interim legislative session activities.

**5. Other Action Items**

Ms. Edwards presented various appointments to the board for approval. **[Exhibit J]**

**Motion:** Mr. Wilhoite moved, Mr. Ramfjord seconded, and the board voted to approve the appointments. Mr. Williams abstained.

Mr. Spier presented Ms. Wright's Legal Opportunities Coordinator Summary Report which included recommendations from the recent "Stakeholders Meeting." The Governance & Strategic Planning Committee will address these recommendations at future meetings.

Ms. Zinser gave a report on the first two chapters of "Relevant Lawyer." **[Exhibit K]**  
Mr. Mansfield volunteered to report on the next two chapters at the next board meeting.

Mr. Greco suggested and Mr. Heysell confirmed that there is no current need to conduct a survey to assess member's view of OSB programs. Mr. Wilhoite suggested the bar survey the membership's thinking on a regular, periodic basis as part of its responsibility for program review.

Mr. Spier asked for a BOG member to volunteer as liaison to the Board of Bar Examiners, pursuant to the bylaws adopted in July 2015. No one volunteered so Mr. Spier call on board members in the near future.

Ms. Stevens asked the board to revisit the decision made without a quorum on July 24 regarding repurposing the Members' Room to accommodate nursing mothers and members with health needs that require a private, hygienic space. She shared an email from the Legal Heritage Interest Group urging retention of as much of the current furnishings as possible.

**Motion:** Mr. Greco moved, Ms. Matsumonji seconded, that the board delegate the entire issue to the Executive Director. Ms. Kohlhoff opposed the motion; all others voted yes.

## **6. Consent Agenda**

**Motion:** Mr. Chaney moved, Mr. Mansfield seconded, and the board voted unanimously to approve the consent agenda of past meeting minutes.

## **7. Closed Session (Executive Session pursuant to ORS 192.660(1)(f) and (h)) General Counsel/UPL Report – see CLOSED Minutes**

**Good of the Order (Non-action comments, information and notice of need for possible future board action)**

**Oregon State Bar  
Board of Governors Meeting  
September 11, 2015  
Executive Session Minutes**

Discussion of items on this agenda is in executive session pursuant to ORS 192.660(2)(f) and (h) to consider exempt records and to consult with counsel. This portion of the meeting is open only to board members, staff, other persons the board may wish to include, and to the media except as provided in ORS 192.660(5) and subject to instruction as to what can be disclosed. Final actions are taken in open session and reflected in the minutes, which are a public record. The minutes will not contain any information that is not required to be included or which would defeat the purpose of the executive session.

A. Pending or Threatened Non-Disciplinary Litigation

Ms. Hirschbiel informed the board of non-action items.

In the matter of *Lauren Paulson v. Oregon State Bar et al* (Ninth Circuit Court of Appeals), upon request from Mr. Spier, Ms. Hirschbiel will distribute the decision from the Ninth Circuit which recently upheld the trial court's dismissal of Mr. Paulson's complaint. She will also distribute to the board Mr. Paulson's petition he filed for reconsideration.

B. Other Items

Ms. Hirschbiel informed the board of other items.

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# OREGON STATE BAR

## Board of Governors Agenda

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**Meeting Date:** September 11, 2015  
**Memo Date:** August 24, 2015  
**From:** Carol J. Bernick, PLF CEO  
**Re:** 2016 PLF Assessment and Budget

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### **Action Recommended**

Approve the 2016 Budget and Assessment.

### **Background**

On an annual basis, the Board of Governors approves the PLF budget and assessment for the coming year. The Board of Directors proposes that the assessment remain at \$3,500 (unchanged from 2015). The attached materials contain the proposed budget and recommendations concerning the assessment.

The highlights of the budget include a 3% salary pool and a \$200,000 contribution to the OSB for BarBooks. The overall increase to the 2016 budget is 2.59 percent higher than the 2015 budget. The main reasons for the increases are the 3% salary increase and related benefits costs, increased costs associated with overhauling and promoting the Excess Plan and employee training and travel.

Attachments

August 12, 2015

To: PLF Finance Committee (Dennis Black, Chair; Tim Martinez, Ira Zarov) and PLF Board of Directors

From: Carol J. Bernick, Chief Executive Officer  
Betty Lou Morrow, Chief Financial Officer

Re: 2016 PLF Budget and 2016 PLF Primary Assessment

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### **I. Recommended Action**

We recommend that the Finance Committee make the following recommendations to the PLF Board of Directors:

1. Approve the 2016 PLF budget as attached.
2. Recommend to the Board of Governors that the 2016 PLF Primary Program assessment remain at \$3,500, which is the same as it has been for the past five years.

### **II. Executive Summary**

1. Both the Executive Director of the Bar and we recommend a 3.0% increase to the salary pool. We are also recommending a 0.7% increase for individual salary reclassifications. Medical benefits are projected to increase in 2016 by an approximate 5%.
2. Loss Prevention had a retirement in 2015 in addition to .5FTE new hire. In 2015 the Claims department replaced a claims secretary who retired in 2014. Accounting and Administration remained at the same FTE as 2015.
3. The actuarial rate study estimates a cost of \$2,730 per lawyer for new 2016 claims, remaining the same from 2015. As in the past, this budget includes a factor of \$150 per attorney for adverse development of pending claims; and a margin of \$573 per attorney to cover unfunded operations.



### **III. 2016 PLF Budget**

#### **Number of Covered Attorneys**

We have provided the number of covered attorneys by period for both the Primary and Excess Programs. (The figures are found on pages 1 and 8 of the budget document.) These statistics illustrate the changes in the number of lawyers covered by each program and facilitate period-to-period comparisons.

For the Primary Program, new attorneys paying reduced primary assessments and lawyers covered for portions of the year have been combined into "full pay" attorneys. We project 6,950 full-pay attorneys for 2016. Over the five years ending 2014, the average annual growth of full-pay attorneys was .92 percent. For 2015, we are projecting a 2.1% decrease in the number of "full pay" attorneys from 2015 budget. The addition of a third year of new attorney discounts contributes to this decrease. Nonetheless, we have chosen to use a flat growth rate (the same 6950 full-pay attorneys) for our 2016 budget.

Although the Excess Program covers firms, the budget lists the total number of attorneys covered by the Excess Program. Participation in the Excess Program has declined since 2012, primarily because of competition from commercial carriers. Covered attorneys at Excess dropped 5.6% from 2012 to 2013; 4.5% 2013 to 2014; and a 4.2% year to date decline from 2014 to 2015. However the 2016 plan year will mark the introduction of factor based underwriting. It is difficult to accurately predict how this will impact the total premium for 2016. Therefore we are forecasting the number of covered attorneys and premiums will remain flat from 2015. We recognize that some firms will drop coverage as their premiums increase to match their risk profile. However through increased marketing (both general and targeted) we are forecasting adding new firms equal to the rate at which we may lose them.

#### **Full-time Employee Statistics (Staff Positions)**

We have included "full-time equivalent" or FTE statistics to show PLF staffing levels from year to year. FTE statistics are given for each department on their operating expense schedule. The following table shows positions by department. Each department is indicated net of Excess staff allocations (explained below):

	<b><u>2015 Projections</u></b>	<b><u>2016 Budget</u></b>
Administration	6.92. FTE	6.92. FTE
Claims	19.81 FTE	19.81 FTE
Loss Prevention (includes OAAP)	14.05 FTE	14.05 FTE
Accounting	7.05 FTE	7.05 FTE
Excess Allocations	<u>3.60 FTE</u>	<u>3.60 FTE</u>
<b>Total</b>	<b>51.43 FTE</b>	<b>51.43 FTE</b>

### **Allocation of Costs between the Excess and Primary Programs**

In 1991, the PLF established an optional underwritten plan to provide excess coverage above the existing mandatory plan. There is separate accounting for Excess Program assets, liabilities, revenues and expenses. The Excess Program reimburses the Primary Program for services so that the Primary Program does not subsidize the cost of the Excess Program. A portion of Primary Program salary, benefits, and other operating costs are allocated to the Excess Program. Salary and benefit allocations are based on an annual review of the time PLF staff spends on Excess Program activities. These allocations are reviewed and adjusted each year. The Excess Program also pays for some direct costs, including printing and reinsurance travel.

### **Primary Program Revenue**

Projected assessment revenue for 2016 is based upon the \$3,500 basic assessment paid by an estimated 6950 attorneys.

Investment returns have fallen short of forecasts for the first six months of 2015. The average annual rate of return for 2015 is projected to be approximately 3.42% versus the budgeted 4.6%. Investment results have been volatile in 2015 thus far. For the 2016 budget we have forecast an individual rate for each fund using a 3-10 period trailing return, depending on the information available. This has provided an overall budgeted return for 2016 of 4.96%. Again, RVK and the Investment Committee have been included in discussion about an appropriate rate of return for 2016. RVK feels that the 4.96% rate is a conservative, but appropriate forecast rate.

### **Primary Program Claims Expense**

By far, the largest cost category for the PLF is claim costs for indemnity and defense. Since claims often don't resolve quickly, these costs are paid over several years after the claim is first made. The ongoing calculation of estimated claim costs, along with investment results are the major factors in determining the Primary Program's positive/negative in-year net position.

For any given year, financial statement claims expense includes two factors – (1) the cost of new claims and (2) any additional upward (or downward) adjustments to the estimate of claims liabilities reflecting positive or adverse claims development for those pending at the beginning of the year. Factor 1 (new claims) is much larger and much more important than factor 2. However, problems would develop if the effects of factor 2 were never considered, particularly if there were consistent patterns of adverse claims development

Our projections of claim costs for 2015 include the actual claim count of 422 claims at June 30, 2015 valued at \$21,000 per new claim, in addition to 430 claims for the final six months of 2015<sup>1</sup> (6950 covered parties with a claims frequency of 12.25%) valued at \$22,000 per new claim. The

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<sup>1</sup> Although we have budgeted 885 new claims for 2015, as of August 10, 2015 we are tracking at 815.

\$21,000 cost per claim level increased to \$22,000 at the recommendation of the PLF actuaries. The \$150 per attorney factor for adverse claims developments will remain as budgeted for 2015. This is a conservative estimate as the June 30, 2015 correction was nearly \$1 million to accommodate worse than expected indemnity claims development. We believe there will be an offsetting correction in the second half of 2015. However, we are leaving the estimates as indicated because of the unpredictable nature of claims development.

Primary Program new claims expense for 2016 was based on figures calculated from the actuarial rate study. The study assumed a frequency rate of 11.83% for 2015 claims. Because this results in an annual claim count much lower than what we have seen the last several years, we are assuming the frequency (claim) rate will increase somewhat as 2015 progresses so we have used a frequency level of 12.00 for 2016 claims. Therefore, 6950 attorneys with a 12% claims frequency equates to 834 claims. When these claims are multiplied by the average cost of claims, the total claims liability for 2016 is \$18,348,000.

We will continue to use a factor of \$150 per attorney to cover adverse development of pending claims. If the claims do not develop adversely, this margin could offset negative economic events, or help the PLF reach the net position goal. The pending claims budget for adverse development is equal to \$1,042,0000 (\$150 times the estimated 6,950 full pay attorneys).

### **Salary Pool for 2016**

The total dollar amount that is available for staff salary increases in a given year is calculated by multiplying the salary pool percentage increase by the current employee salary levels. The salary pool is the only source available for cost of living *and* merit increases.

In consultation with Sylvia Stevens, a three percent cost of living increase is recommended for 2016. The salary pool also includes a 0.7% management tool for individual merit increases and reclassifications. The bulk of the salary reclassification amount reflects either the reclassification of relatively recently hired employees or addresses an historical lack of parity between the salaries of employees in positions with equivalent responsibilities. (Exempt positions are generally professional positions and are not subject to wage and hour requirements.) Salaries for entry level hires of exempt positions are significantly lower than experienced staff. As new staff members become proficient, they are reclassified and their salaries are adjusted appropriately. As the Board is aware, several new claims attorneys have been hired in recent years. The major reclassification usually occurs after approximately three years, although the process of salary adjustment often occurs over a longer period.

As a point of reference, one percent in the salary pool represents approximately \$44,000 in PLF salary expense and \$16,000 in PLF benefit costs. The total cost of the 3.7% salary pool is slightly more than one half of one percent of total expenses (0.56%).

### **Benefit Expense**

The employer cost of PERS and Medical / Dental insurance are the two major cost drivers for PLF benefits.

The employer contribution rates for PERS have both increased and decreased for the biennium beginning July 2015. The rates for Tier 1 and 2 employees will increase from 17.66% to 20.51% For OPSRP employees the rates will decrease from 14.84% down to 14.01%. In 2016 the PLF will have 11 employees in Tier 1 or 2; and 43 employees in the OPSRP plan.

Unlike most state and local employers, the PLF does not “pick up” the employee contribution to PERS. PLF employees have their six percent employee contribution to PERS deducted from their salaries.

The PLF covers the cost of medical and dental insurance for PLF employees. PLF employees pay about fifty percent of the additional cost of providing medical and dental insurance to dependents.

### **Capital Budget Items**

The major capital purchases in 2016 will be new servers for our IT infrastructure and new computers for most staff.

There is a three year plan laid out to expand the existing infrastructure creating efficiencies in our data processing and also creating heightened security and crash resistance. The first of the three years was 2014. Including 2015, all IT infrastructure purchases have been made as scheduled. Most staff will receive a new desktop computer, again in keeping with a five year plan created by the IT department in 2014.

### **Other Primary Operating Expenses with Changes from 2015 +/- 10%**

**Professional Services** have decreased over projected 2015 by about 12%. The majority of this decrease is due to attorney and professional fees (i.e. for website development) from 2015 that will not be incurred in 2016.

**Auto, Travel, and Training** are higher due to increased budgets for the promotion of the PLF generally and the Excess program specifically. Additionally the general market cost of travel is expected to increase.

**Loss Prevention Programs** have increases due to recent hires with accompanying training and travel budgets; the production of two additional handbooks; lease increases; and general expense increases.

**Defense Panel Program** happens only bi-annually, hence no budget for 2016.

## **General Information**

**OSB Bar Books** includes a \$200,000 contribution to the OSB Bar Books. The PLF Board of Directors believes there is loss prevention value in free access for lawyers in Oregon to Bar Books via the internet. The expectation is this access has the potential to reduce future claims.

**Contingency** for 2016 has been set at 1.5%. For many years, the PLF Primary Program has included a contingency budget item. The contingency amount has usually been set between two and four percentage of operating costs. However, the contingency fund has not been accessed in either 2013 or 2014, hence we are decreasing the contingency to the stated level of 1.5%.

## **Total Operating Expenses and the Assessment Contribution to Operating Expenses**

Page one of the budget shows 2015 projected Primary Program operating costs to be 1.2% lower than the 2015 budget amount.

The 2016 Primary Program operating budget is 3.9% percent higher than the 2015 projections and 2.6% percent higher than the 2015 budget. The main reasons for the increases are the 3% salary increase and related benefits costs; increased costs associated with PLF primary and excess program promotion; and increased staff training.

## **Excess Program Budget**

Participation in the Excess Program has declined since 2011 because of competition from commercial carriers. Staff has worked with AON and the reinsurers to create a more competitive premium structure as well as mining additional claims data for more meaningful analysis by both the PLF and the reinsurers. The results of this updated premium structure will become more apparent through the 2016 plan year underwriting process. Because the impact is still unknown, we are budgeting for a flat increase to premiums for 2016.

The major revenue item for the Excess Program is ceding commissions. These commissions represent the portion of the excess premium that the PLF retains. The commissions are based upon a percentage of the premium charged, with commissions varying depending on the coverage limits. Most of the excess premium is turned over to reinsurers who cover the costs of excess claims. We currently project ceding commission of \$762,000 for 2016. This represents an expectation of the commission remaining flat from expected 2015 levels.

After three or four years from the start of a given plan year, the two reinsurance treaties covering the first \$5 million of coverage provide for profit commissions if excess claim payments are low. If there are subsequent adverse developments, prior profit commissions are returned to the reinsurance companies. In recent years, excess claims have increased and it is quite difficult to predict profit commissions in advance. Actual profit commissions have proven to be rather small. As a result, no profit commissions have been included in the 2015 projections or 2016 budget.

Excess investment earnings are calculated using a formula that allocates investment revenue based on contribution to cash flow from the Excess program.

The major expenses for the Excess Program are salary, benefits, and operations allocations from the Primary Program.

#### **IV. Actuarial Rate Study for 2016**

The actuaries review claims liabilities twice a year, at the end of June and December. They also prepare an annual rate study to assist the Board of Directors in setting the assessment. The attached rate study focuses on the estimate of 2016 average claim cost per attorney. It relies heavily on the analysis contained in the actuaries' claim liability study as of June 30, 2015. The rate study calculates only the cost of new 2016 claims. It does not consider adjustments to pending claims, investment results, or administrative operating costs.

The actuaries estimate the 2016 claim cost per attorney using two different methods. The first method (shown on Exhibit 1) uses regression analysis to determine the trends in the cost of claims. Regression analysis is a statistical technique used to fit a straight line to a number of points on a graph. It is very difficult to choose an appropriate trend because the small amount and volatility of data, and different ranges of PLF claim years produce very different trend numbers. The selection of the starting and ending points is very significant. For the PLF, including a low claim starting point such as 1987 or a very high claim point such as 2000 skews the straight line significantly up or down. Because of these problems, the actuaries do not favor using this technique to predict future claim costs.

The second method (Exhibit 2) involves selection of expected claim frequency and claim severity (average cost). Claims frequency is defined as the number of claims divided by the number of full pay attorneys. For the indicated amount the actuaries have used a 2016 claims frequency rate of 13 percent and \$21,000 as the average cost per claim (severity), identical in both aspects to 2015. The actuaries prefer the result found with this second method. Their indicated average claim cost is \$2,730 per attorney. This amount would only cover the estimated funds needed for 2016 new claims.

It is necessary to calculate a provision for operating expenses not covered by non-assessment revenue. As can be seen in the budget, the estimate of non-assessment revenue does not cover the budget for operating expenses. The 2016 shortfall is about \$573 per lawyer, down from \$586 in 2015. The actuaries discuss the possibility of having a margin (additional amount) in the calculated assessment. On pages 8 of their report, the actuaries list pros and cons for having a margin in the assessment.

#### **V. Staff Assessment Recommendation**

The operating margin of \$573 per lawyer, in addition to the claim cost per attorney of \$2,730, would achieve an assessment of \$3,303. We feel that it is appropriate to include an additional factor of \$150 per attorney for adverse development of pending claims. This allows for a budget of about

\$1.04 million for adverse development of pending claims. An assessment of \$3,500 would allow a projected budget profit of about \$952,044.

Given the factors discussed above, the PLF staff feels that the current Primary Program assessment should be maintained for the remainder of 2015. Additionally, we recommend setting the 2016 Primary Program assessment at \$3,500.

The Finance Committee will discuss the actuarial report during its telephone conference meeting at 11:00 a.m. on August 12, 2015 and prepare recommendations for the Board of Directors. The full Board of Directors will then act upon the committee's recommendations at their board meeting on August 20, 2015.



**OREGON STATE BAR  
PROFESSIONAL LIABILITY FUND  
2016 PRIMARY PROGRAM BUDGET**  
Presented to PLF Board of Directors on August 20, 2015

	<u>2013 ACTUAL</u>	<u>2014 ACTUAL</u>	<u>2015 BUDGET</u>	<u>2015 PROJECTIONS</u>	<u>2016 BUDGET</u>
<b><u>Revenue</u></b>					
Assessments	\$25,042,533	\$24,668,300	\$24,867,500	\$24,325,465	\$24,325,000
Installment Service Charge	391,097	378,008	335,000	391,000	400,000
Investments and Other	<u>4,364,988</u>	<u>2,418,326</u>	<u>2,472,882</u>	<u>2,171,405</u>	<u>3,347,495</u>
Total Revenue	<u>\$29,798,618</u>	<u>\$27,464,633</u>	<u>\$27,675,382</u>	<u>\$26,887,870</u>	<u>\$28,072,495</u>
<b><u>Expenses</u></b>					
Provision for Claims					
New Claims	\$17,427,049	\$19,595,940	\$18,576,023	\$18,322,000	\$18,348,000
Pending Claims	<u>\$664,998</u>	<u>(\$987,534)</u>	<u>\$1,065,750</u>	<u>\$1,042,500</u>	<u>\$1,042,500</u>
Total Provision for Claims	<u>\$18,092,047</u>	<u>\$18,608,406</u>	<u>\$19,641,773</u>	<u>\$19,364,500</u>	<u>\$19,390,500</u>
Expense from Operations					
Administration	\$2,348,769	\$2,348,769	\$2,565,414	\$2,633,503	\$2,641,457
Accounting	805,336	805,336	801,989	758,479	856,619
Loss Prevention	2,016,547	2,016,547	2,234,762	2,123,477	2,244,500
Claims	<u>2,488,569</u>	<u>2,488,569</u>	<u>2,684,938</u>	<u>2,669,255</u>	<u>2,759,324</u>
Total Operating Expense	\$7,659,221	\$7,659,221	\$8,287,103	\$8,184,715	\$8,501,900
Contingency	0	0	248,613	0	127,529
Depreciation	166,575	164,678	169,800	156,859	189,540
Allocated to Excess Program	<u>(1,135,160)</u>	<u>(1,145,155)</u>	<u>(1,008,049)</u>	<u>(1,026,172)</u>	<u>(1,089,018)</u>
Total Expenses	<u>\$24,782,683</u>	<u>\$25,287,150</u>	<u>\$27,339,240</u>	<u>\$26,679,903</u>	<u>\$27,120,451</u>
Net Income (Loss)	<u>\$5,015,935</u>	<u>\$2,177,484</u>	<u>\$336,142</u>	<u>\$207,967</u>	<u>\$952,044</u>
Number of Full Pay Attorneys	7,093	7,104	7,105	6,950	6,950

**CHANGE IN OPERATING EXPENSES:**

Increase from 2015 Budget 2.59%

Increase from 2015 Projections 3.88%

**OREGON STATE BAR  
PROFESSIONAL LIABILITY FUND  
2016 PRIMARY PROGRAM BUDGET  
CONDENSED STATEMENT OF OPERATING EXPENSE  
Presented to PLF Board of Directors on August 20, 2015**

	<u>2013 ACTUAL</u>	<u>2014 BUDGET</u>	<u>2015 BUDGET</u>	<u>2015 PROJECTIONS</u>	<u>2016 BUDGET</u>
<b><u>Expenses</u></b>					
Salaries	\$4,145,086	\$4,189,074	\$4,387,818	\$4,392,352	\$4,589,868
Benefits and Payroll Taxes	1,457,187	1,486,255	1,653,606	1,540,419	1,675,126
Professional Services	331,128	325,775	381,792	431,900	380,792
Auto, Travel & Training	92,557	109,931	151,450	134,200	168,900
Office Rent	521,138	512,379	520,065	512,379	527,865
Office Expense	133,569	155,121	157,850	161,250	171,050
Telephone (Administration)	48,675	49,326	49,560	51,000	51,500
L P Programs	373,908	483,532	488,894	446,665	503,906
OSB Bar Books	200,000	200,000	200,000	200,000	200,000
Defense Panel Program	9,970	1,915	64,422	67,500	0
Insurance	71,471	38,344	41,894	42,000	41,894
Library	32,659	31,741	39,000	29,500	31,500
Memberships & Subscriptions	21,458	22,469	28,000	35,000	36,500
Interest & Bank Charges	5,213	56,088	122,752	114,500	123,000
<b>Total Operating Expenses</b>	<b><u>\$7,444,018</u></b>	<b><u>\$7,661,949</u></b>	<b><u>\$8,287,103</u></b>	<b><u>\$8,158,665</u></b>	<b><u>\$8,501,900</u></b>
Allocated to Excess Program	<u>(\$1,105,104)</u>	<u>(\$1,120,789)</u>	<u>(\$987,350)</u>	<u>(\$1,001,806)</u>	<u>(\$1,064,814)</u>
<b>Full Time Employees</b>	<b>43.88</b>	<b>49.53</b>	<b>51.28</b>	<b>51.43</b>	<b>51.43</b>
<b>Number of Full Pay Attorneys</b>	<b>7,093</b>	<b>7,104</b>	<b>7,105</b>	<b>6,950</b>	<b>6,950</b>
<b>Non-personnel Expenses</b>	<b>\$1,841,746</b>	<b>\$1,986,620</b>	<b>\$2,245,679</b>	<b>\$2,225,894</b>	<b>\$2,236,906</b>
Allocated to Excess Program	<u>(\$278,874)</u>	<u>(\$270,406)</u>	<u>(\$270,823)</u>	<u>(\$270,406)</u>	<u>(\$282,589)</u>
<b>Total Non-personnel Expenses</b>	<b><u>1,562,872</u></b>	<b><u>1,716,214</u></b>	<b><u>1,974,856</u></b>	<b><u>1,955,488</u></b>	<b><u>1,954,317</u></b>
<b>CHANGE IN OPERATING EXPENSES:</b>					
Increase from 2015 Budget		2.59%			
Increase from 2015 Projections		4.21%			

**OREGON STATE BAR  
PROFESSIONAL LIABILITY FUND  
2016 PRIMARY PROGRAM BUDGET  
ADMINISTRATION**

Presented to PLF Board of Directors on August 20, 2015

	<u>2013</u> <u>ACTUAL</u>	<u>2014</u> <u>ACTUAL</u>	<u>2015</u> <u>BUDGET</u>	<u>2015</u> <u>PROJECTIONS</u>	<u>2016</u> <u>BUDGET</u>
<b><u>Expenses</u></b>					
Salaries	\$641,274	\$684,773	\$728,240	\$729,415	\$749,009
Benefits and Payroll Taxes	238,566	233,366	261,411	253,959	262,448
Staff Travel	21,363	37,354	23,050	41,100	46,000
Board of Directors Travel	35,514	35,244	46,150	44,500	48,650
Training	8,947	13,651	12,000	12,000	12,000
Investment Services	28,018	28,095	40,000	38,500	40,000
Legal Services	13,738	11,461	10,000	20,000	10,000
Actuarial Services	19,731	24,209	29,300	33,000	34,300
Information Services	136,221	83,788	111,000	82,000	96,000
Electronic Record Scanning	47,086	44,859	65,000	60,000	65,000
Other Professional Services	63,734	110,564	100,492	175,800	112,492
OSB Bar Books	200,000	200,000	200,000	200,000	200,000
Office Rent	521,138	512,379	520,065	512,379	527,865
Equipment Rent & Maint.	38,672	45,047	48,000	49,500	53,000
Dues and Memberships	21,458	22,469	28,000	35,000	36,500
Office Supplies	51,661	70,597	70,000	67,000	69,000
Insurance	71,471	38,344	41,894	42,000	41,894
Telephone	48,675	49,326	49,560	51,000	51,500
Printing	7,629	11,472	10,000	15,000	17,500
Postage & Delivery	33,400	27,482	28,350	29,750	31,550
NABRICO - Assoc. of Bar Co.s	10,959	7,680	18,650	12,100	13,750
Bank Charges & Interest	5,213	56,088	122,752	114,500	123,000
Repairs	2,207	523	1,500	0	0
Miscellaneous	<u>0</u>	<u>0</u>	<u>0</u>	<u>15,000</u>	<u>0</u>
Total Operating Expenses	<u>\$2,266,674</u>	<u>\$2,348,769</u>	<u>\$2,565,414</u>	<u>\$2,633,503</u>	<u>\$2,641,457</u>
Allocated to Excess Program	<u>(\$430,857)</u>	<u>(\$461,595)</u>	<u>(\$433,228)</u>	<u>(\$442,889)</u>	<u>(\$484,563)</u>
Administration Department FTE	8.00	10.00	9.00	9.00	9.00
<b>CHANGE IN OPERATING EXPENSES:</b>					
Increase from 2015 Budget		2.96%			
Increase from 2015 Projections		0.30%			

**OREGON STATE BAR  
PROFESSIONAL LIABILITY FUND  
2016 PRIMARY PROGRAM BUDGET  
ACCOUNTING/INFORMATION TECHNOLOGY  
Presented to PLF Board of Directors on August 20, 2015**

	<u>2013 ACTUAL</u>	<u>2014 ACTUAL</u>	<u>2015 BUDGET</u>	<u>2015 PROJECTIONS</u>	<u>2016 BUDGET</u>
<b><u>Expenses</u></b>					
Salaries	\$584,637	\$576,354	\$539,231	\$546,843	\$598,523
Benefits and Payroll Taxes	199,808	200,385	226,758	184,536	230,596
Travel	544	1,311	5,000	2,500	2,500
Financial Audit	22,600	22,800	26,000	22,600	23,000
Training	<u>1,687</u>	<u>4,487</u>	<u>5,000</u>	<u>2,000</u>	<u>2,000</u>
 Total Operating Expenses	 <u>\$809,276</u>	 <u>\$805,336</u>	 <u>\$801,989</u>	 <u>\$758,479</u>	 <u>\$856,619</u>
 Allocated to Excess Program	 <u>(\$111,674)</u>	 <u>(\$90,264)</u>	 <u>(\$109,142)</u>	 <u>(\$111,205)</u>	 <u>(\$116,260)</u>
  Accounting Department FTE	  5.95	  5.95	  7.95	  7.95	  7.95
  <b>CHANGE IN OPERATING EXPENSES:</b>					
Increase from 2015 Budget		6.81%			
Increase from 2015 Projections		12.94%			

**OREGON STATE BAR  
PROFESSIONAL LIABILITY FUND  
2016 PRIMARY PROGRAM BUDGET  
LOSS PREVENTION (Includes OAAP)**

Presented to PLF Board of Directors on August 20, 2015

	<u>2013</u> <u>ACTUAL</u>	<u>2014</u> <u>ACTUAL</u>	<u>2015</u> <u>BUDGET</u>	<u>2015</u> <u>PROJECTIONS</u>	<u>2016</u> <u>BUDGET</u>
<b><u>Expenses</u></b>					
Salaries	\$1,065,411	\$1,111,996	\$1,268,556	\$1,240,383	\$1,269,122
Benefits and Payroll Taxes	390,424	423,748	477,312	449,379	471,472
In Brief	46,731	66,468	70,000	55,000	70,000
PLF Handbooks	4,949	45,758	6,000	5,000	9,000
Library	389	997	5,000	500	1,000
Video and Audio Tapes	44,382	33,193	32,000	30,000	30,000
Mail Distribution of Video and Audiotapes	14,607	14,341	14,000	12,000	12,000
Web Distribution of Programs	25,215	58,940	20,000	35,000	35,000
Program Promotion	16,863	16,452	22,000	18,000	22,000
Expense of Closing Offices	3,691	7,330	10,500	14,000	15,000
Facilities	42,828	45,804	47,000	47,000	47,000
Speaker Expense	4,466	(1,362)	5,000	12,000	10,000
Accreditation Fees	1,205	956	1,600	1,200	1,600
Beepers & Confidential Phone	5,110	6,430	5,300	7,000	7,000
Expert Assistance	0	0	5,000	2,500	5,000
Bad Debts from Loans	0	2,325	0	0	0
Memberships & Subscriptions	10,517	11,855	14,150	11,600	14,200
Travel	26,541	30,792	43,600	20,265	35,750
Training	25,420	29,571	42,500	30,450	44,000
Downtown Office	100,992	110,893	141,744	129,200	141,856
Miscellaneous	<u>0</u>	<u>60</u>	<u>3,500</u>	<u>3,000</u>	<u>3,500</u>
 Total Operating Expenses	 <u>\$1,829,743</u>	 <u>\$2,016,547</u>	 <u>\$2,234,762</u>	 <u>\$2,123,477</u>	 <u>\$2,244,500</u>
 Allocated to Excess Program	 <u>(\$209,540)</u>	 <u>(\$225,930)</u>	 <u>(\$120,701)</u>	 <u>(\$124,757)</u>	 <u>(\$125,338)</u>
  Loss Prevention Department FTE (Includes OAAP)	  11.83	  13.58	  14.58	  14.08	  14.08
  CHANGE IN OPERATING EXPENSES:					
Increase from 2015 Budget		0.44%			
Increase from 2015 Projections		5.70%			

OREGON STATE BAR  
PROFESSIONAL LIABILITY FUND  
2016 PRIMARY PROGRAM BUDGET  
CLAIMS DEPARTMENT

Presented to PLF Board of Directors on August 20, 2015

	2013 <u>ACTUAL</u>	2014 <u>ACTUAL</u>	2015 <u>BUDGET</u>	2015 <u>PROJECTIONS</u>	2016 <u>BUDGET</u>
<b><u>Expenses</u></b>					
Salaries	\$1,853,764	\$1,815,952	\$1,851,790	\$1,875,710	\$1,973,214
Benefits and Payroll Taxes	628,388	628,756	688,126	652,545	710,610
Training	8,577	4,620	29,000	36,000	36,000
Travel	4,966	5,584	12,600	8,000	8,000
Library & Information Systems	32,659	31,741	39,000	29,500	31,500
Defense Panel Program	<u>9,970</u>	<u>1,915</u>	<u>64,422</u>	<u>67,500</u>	<u>0</u>
Total Operating Expenses	<u>\$2,538,325</u>	<u>\$2,488,569</u>	<u>\$2,684,938</u>	<u>\$2,669,255</u>	<u>\$2,759,324</u>
Allocated to Excess Program	<u>(\$353,033)</u>	<u>(\$343,000)</u>	<u>(\$324,279)</u>	<u>(\$322,955)</u>	<u>(\$338,653)</u>
Claims Department FTE	18.10	20.33	19.40	20.40	20.40
CHANGE IN OPERATING EXPENSES:					
Increase from 2015 Budget		2.77%			
Increase from 2015 Projections		3.37%			

**OREGON STATE BAR  
PROFESSIONAL LIABILITY FUND  
2016 PRIMARY PROGRAM BUDGET  
CAPITAL BUDGET**

**Presented to PLF Board of Directors on August 20, 2015**

	<u>2013 ACTUAL</u>	<u>2014 ACTUAL</u>	<u>2015 BUDGET</u>	<u>2015 PROJECTIONS</u>	<u>2016 BUDGET</u>
<b><u>Capital Items</u></b>					
Furniture and Equipment	\$0	\$0	\$7,000	\$8,000	\$7,000
Telephone	0	0		0	0
Copiers / Scanners	0	0	5,000	2,500	5,000
Audiovisual Equipment	0	0	25,000	0	0
Data Processing					
Hardware	0	0	22,000	25,000	25,000
Software	0	0	6,000	4,000	6,000
PCs, Ipads and Printers	0	0	7,500	7,500	127,450
Leasehold Improvements	<u>0</u>	<u>0</u>	<u>5,000</u>	<u>15,000</u>	<u>10,000</u>
 Total Capital Budget	 <u>\$0</u>	 <u>\$0</u>	 <u>\$77,500</u>	 <u>\$62,000</u>	 <u>\$180,450</u>
 Increase from 2015 budget		132.84%			
 Increase from 2015 Projections		191.05%			

**OREGON STATE BAR  
PROFESSIONAL LIABILITY FUND  
2015 EXCESS PROGRAM BUDGET  
Presented to PLF Board of Directors on August 20, 2015**

	<u>2013 ACTUAL</u>	<u>2014 ACTUAL</u>	<u>2015 BUDGET</u>	<u>2015 PROJECTIONS</u>	<u>2016 BUDGET</u>
<b><u>Revenue</u></b>					
Ceding Commission	747,993	797,386	760,000	762,000	762,000
Profit Commission	32,069	22,021	0	0	0
Installment Service Charge	41,433	39,808	42,000	41,500	42,000
Other	7,913	21,393	6,900	6,900	6,900
Investment Earnings	<u>330,352</u>	<u>218,440</u>	<u>186,131</u>	<u>60,605</u>	<u>170,879</u>
Total Revenue	<u>\$1,159,760</u>	<u>\$1,099,049</u>	<u>\$995,031</u>	<u>\$871,005</u>	<u>\$981,779</u>
<b><u>Expenses</u></b>					
Allocated Salaries	\$599,356	\$621,781	\$621,781	\$621,781	\$586,164
Direct Salaries	73,078	76,929	0	0	0
Allocated Benefits	226,874	228,602	228,602	228,602	196,061
Direct Benefits	24,120	30,051	27,684	0	0
Program Promotion	3,922	8,625	0	7,500	15,000
Investment Services	1,982	1,905	2,500	2,500	2,850
Allocation of Primary Overhead	278,874	270,406	270,823	278,874	282,589
Reinsurance Placement Travel	369	18,120	25,000	20,000	20,000
Training	0	0	500	500	500
Printing and Mailing	4,035	1,947	5,500	5,500	6,500
Other Professional Services	0	16	2,000	2,000	2,000
Software Development	<u>0</u>	<u>0</u>	<u>0</u>	<u>0</u>	<u>0</u>
Total Expense	<u>\$1,212,611</u>	<u>\$1,258,383</u>	<u>\$1,184,390</u>	<u>\$1,167,257</u>	<u>\$1,111,664</u>
Allocated Depreciation	<u>\$30,056</u>	<u>\$24,366</u>	<u>\$20,699</u>	<u>\$16,980</u>	<u>\$17,200</u>
Net Income	<u>(\$82,907)</u>	<u>(\$183,700)</u>	<u>(\$210,058)</u>	<u>(\$313,232)</u>	<u>(\$147,085)</u>
Full Time Employees	1.00	1.00	0.00	0.00	0.00
Number of Covered Attorneys	2,193	2,395	2,140	2,025	2,025
<b>CHANGE IN OPERATING EXPENSES:</b>					
Decrease from 2015 Budget		-6.14%			
Decrease from 2015 Projections		-4.76%			



# OREGON STATE BAR

## Board of Governors Agenda

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**Meeting Date:** September 11, 2015  
**Memo Date:** August 24, 2015  
**From:** Carol J. Bernick, PLF CEO  
**Re:** 2016 PLF Claims Made Primary Plan, Excess Plan, and Pro Bono Plan

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### **Action Recommended**

The Board of Directors (BOD) of the Professional Liability Fund requests that the Board of Governors approve the proposed 2016 PLF Claims Made Plan, Excess Plan, and Pro Bono Plan. There are changes to all three plans.

### **Background**

There are three operative PLF Coverage Plans – the Primary Program Coverage Plan, the Excess Plan, and the Pro Bono Plan. The Excess Plan covers firms and individuals who purchase excess coverage from the PLF. The Pro Bono Plan covers lawyers who volunteer for OSB approved legal services programs, but who do not have malpractice coverage either from the PLF or another source.

The PLF convened a work group to do a complete review of the Primary Plan. That group consisted of Madeleine Campbell, Claims Attorney, Bill Earle, coverage counsel for the Fund, Jeff Crawford and Emilee Preble, who run the excess program, and me.

The substantive changes are in Exclusion 2 (Wrongful Conduct), Exclusion 8 (ORPC 1.8 Conflict Letters); Exclusion 10 (Business of Law Practice); and Exclusion 11 (Family Members).

#### Exclusion 2: Wrongful Conduct

The primary purpose of the changes was to clarify for both the covered parties and the Fund what activities should be excluded.

#### Exclusion 8: ORPC 1.8 Conflict Letters

The previous language required covered parties to send the PLF copies of their conflict letters and the PLF could deny coverage if the letter was not sent. But we have had situations where letters were properly sent by the covered party and not sent to the PLF and it seemed to be a harsh outcome to deny coverage based on this technicality. This is particularly true given that the PLF does not – and would not – endorse or otherwise approve the form of the letter. By eliminating the requirement that the letter be sent to the PLF (coverage could still be denied if the letter is not sent), we avoid any implication of approval of the form of letter sent to us.

Exclusion 10: Business of Law Practice

These changes are intended to clarify what is the practice of law and what is the business of law. This issue arises most frequently in fee disputes.

Exclusion 11: Family Members

This change makes clear that if a partner does legal work for a family member or a family member's business, not only is there no coverage for that attorney, but there is no coverage for the law firm. This does not prevent a lawyer in your firm from doing work for your family member or his/her business.

Excess Plan: Section XIV – Extended Reporting (ERC)

We changed the ERC eligibility to be discretionary. Although most firms would be offered ERC, we want to have flexibility to deny ERC if facts and circumstances warrant it.

Excess Plan: Rates

Although the rates are not part of the Plan, the PLF is eliminating the current two-tier rate model for a more viable underwriting rating scheme. This change will eliminate the BOG's approval of specific rates and replace it with approval of the rating policy. This will be presented at a future BOG meeting.

This review was useful for the work group and for the Board. It caused us to identify other provisions of the Plan that warrant further review and possible changes, which we will undertake next year.

Attachments:

- 2016 PLF Primary Coverage Plan - Tracked
- 2016 PLF Excess Coverage Plan - Tracked
- 2016 PLF Pro Bono Coverage Plan - Tracked

**OREGON STATE BAR  
PROFESSIONAL LIABILITY FUND**

**201~~65~~ CLAIMS MADE PLAN**

**NOTICE**

This Claims Made Plan (“Plan”) contains provisions that reduce the Limits of Coverage by the costs of legal defense. See SECTIONS IV and VI.

Various provisions in this Plan restrict coverage. Read the entire Plan to determine rights, duties, and what is and is not covered.

**INTERPRETATION OF THIS PLAN**

**~~Preface and Aid to Interpretation.~~** The Professional Liability Fund (“PLF”) is an instrumentality of the Oregon State Bar created pursuant to powers delegated to it in ORS 9.080(2)(a). ~~The statute states in part:~~

~~The board shall have the authority to require all active members of the state bar engaged in the private practice of law whose principal offices are in Oregon to carry professional liability insurance and shall be empowered, either by itself or in conjunction with other bar organizations, to do whatever is necessary and convenient to implement this provision, including the authority to own, organize and sponsor any insurance organization authorized under the laws of the State of Oregon and to establish a lawyer’s professional liability fund.~~

~~Pursuant to this statute, the Board of Governors of the Oregon State Bar created a professional liability fund (the Professional Liability Fund) not subject to state insurance law. The initial Plan developed to implement the Board of Governors’ decision, and all subsequent changes to the Plan are approved by both the Board of Directors of the Professional Liability Fund and the Board of Governors.~~

The Plan is not intended to cover all claims that can be made against Oregon lawyers. The limits, exclusions, and conditions of the Plan are in place to enable the PLF to meet the statutory requirements and to meet the Mission and Goals set forth in Chapter One of the PLF Policies, ~~which includes the Goal~~including, “To provide the mandatory professional liability coverage consistent with a sound financial condition, superior claims handling, efficient administration, and effective loss prevention.” The limits, exclusions, and conditions are to be fairly and objectively construed for that purpose. While mandatory malpractice coverage and the existence of the Professional Liability Fund do provide incidental benefits to the public, the Plan is not to be construed as written with the public as an intended beneficiary. The Plan is not an insurance policy ~~and is not an adhesion contract.~~

Because the Plan has limits and exclusions, members of the Oregon State Bar are encouraged to purchase excess malpractice coverage and coverage for excluded claims through general liability and other insurance policies. Lawyers and their firms should consult with their own insurance agents as to available coverages. Excess malpractice coverage is also available through the PLF.

~~**Bracketed Titles.** The bracketed titles appearing throughout this Plan are not part of the Plan and should not be used as an aid in interpreting the Plan. The bracketed titles are intended simply as a guide to locating pertinent provisions.~~

~~**Use of Capitals.** Capitalized terms are defined in SECTION I. The definition of COVERED PARTY appearing in SECTION II and the definition of COVERED ACTIVITY appearing in SECTION III are particularly crucial to the understanding of the Plan.~~

**Plan Comments.** The discussions labeled "*COMMENTS*" following various provisions of the Plan are intended as aids in interpretation. These interpretive provisions add background information and provide additional considerations to be used in the interpretation and construction of the Plan.

~~The Comments are similar in form to those in the Uniform Commercial Code and Restatements. They are intended to aid in the construction of the Plan language. The Comments are to assist attorneys in interpreting the coverage available to them and to provide a specific basis for interpretation by courts and arbitrators.~~

~~**Attorneys in Private Practice; Coverage and Exemption.** Only Oregon attorneys engaged in the "private practice of law" whose principal office is in Oregon are covered by this Plan. ORS 9.080(2). An attorney not engaged in the private practice of law in Oregon or whose principal office is outside Oregon must file a request for exemption with the PLF indicating the attorney is not subject to PLF coverage requirements. Each year, participating attorneys are issued a certificate entitled "Claims Made Plan Declarations." The participating attorney is listed as the "Named Party" in the Declarations.~~

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## SECTION I — DEFINITIONS

Throughout this Plan, when appearing in capital letters:

1. "BUSINESS TRUSTEE" means one who acts in the capacity of or with the title "trustee" and whose activities include the operation, management, or control of any business property, business, or institution in a manner similar to an owner, officer, director, partner, or shareholder.

### *COMMENTS*

~~The term "*BUSINESS TRUSTEE*" is used in SECTION III.3 and in SECTION V.5. This Plan is intended to cover the ordinary range of activities in which attorneys in the private practice of law are typically engaged. The Plan is not intended to cover *BUSINESS TRUSTEE* activities as defined in this Subsection. Examples of types of *BUSINESS TRUSTEE* activities for which coverage is excluded under the Plan include, among other things: serving on the board of trustees of a charitable, educational, or religious institution; serving as the trustee for a real estate or other investment syndication; serving as trustee for the liquidation of any business or institution; and serving as trustee for the control of a union or other institution.~~

~~Attorneys who engage in *BUSINESS TRUSTEE* activities as defined in this Subsection are encouraged to obtain appropriate insurance coverage from the commercial market for their activities.~~

2. "CLAIM" means a demand for DAMAGES or written notice to a COVERED PARTY of an intent to hold a COVERED PARTY liable as a result of a COVERED ACTIVITY, if such notice might reasonably be expected to result in an assertion of a right to DAMAGES.

3. "CLAIMS EXPENSE" means:
- a. Fees and expenses charged by any attorney designated by the PLF;
  - b. All other fees, costs, and expenses resulting from the investigation, adjustment, defense, repair and appeal of a CLAIM, if incurred by the PLF; or
  - c. Fees charged by any attorney designated by the COVERED PARTY with the PLF's written consent.

However, CLAIMS EXPENSE does not include the PLF's costs for compensation of its regular employees and officials or the PLF's other routine administrative costs.

4. "CLAIMS EXPENSE ALLOWANCE" means the separate allowance for aggregate CLAIMS EXPENSE for all CLAIMS as provided for in SECTION VI.1.b of this Plan.
5. "COVERAGE PERIOD" means the coverage period shown in the Declarations under the heading "COVERAGE PERIOD."
6. "COVERED ACTIVITY" means conduct qualifying as such under SECTION III — WHAT IS A COVERED ACTIVITY.
7. "COVERED PARTY" means any person or organization qualifying as such under SECTION II — WHO IS A COVERED PARTY.
8. "DAMAGES" means money to be paid as compensation for harm or loss. It does not refer to fines, penalties, punitive or exemplary damages, or equitable relief such as restitution, disgorgement, rescission, injunctions, accountings, or damages and relief otherwise excluded by this Plan.
9. "EXCESS CLAIMS EXPENSE" means any CLAIMS EXPENSE in excess of the CLAIMS EXPENSE ALLOWANCE. EXCESS CLAIMS EXPENSE is included in the Limits of Coverage at SECTION VI.1.a and reduces amounts available to pay DAMAGES under this Plan.
10. "INVESTMENT ADVICE" refers to any of the following activities:
- a. Advising any person, firm, corporation, or other entity respecting the value of a particular investment, or recommending investing in, purchasing, or selling a particular investment;
  - b. Managing any investment;
  - c. Buying or selling any investment for another;
  - d. (1) Acting as a broker for a borrower or lender, or  
  
(2) Advising or failing to advise any person in connection with the borrowing of any funds or property by any COVERED PARTY for the COVERED PARTY or for another;

- e. Issuing or promulgating any economic analysis of any investment, or warranting or guaranteeing the value, nature, collectability, or characteristics of any investment;
  - f. Giving advice of any nature when the compensation for such advice is in whole or in part contingent or dependent on the success or failure of a particular investment; or
  - g. Inducing someone to make a particular investment.
11. "LAW ENTITY" refers to a professional corporation, partnership, limited liability partnership, limited liability company, or sole proprietorship engaged in the private practice of law in Oregon.
12. "PLAN YEAR" means the period January 1 through December 31 of the calendar year for which this Plan was issued.
13. "PLF" means the Professional Liability Fund of the Oregon State Bar.
14. "SAME OR RELATED CLAIMS" means two or more CLAIMS that are based on or arise out of facts, practices, circumstances, situations, transactions, occurrences, COVERED ACTIVITIES, damages, ~~liability~~liabilities, or the relationships of the people or entities involved (including clients, claimants, attorneys, and/or other advisors) that are logically or causally connected or linked or share a common bond or nexus. ~~CLAIMS are related in the following situations~~Examples include, but are not limited to, the following:
- a. *Secondary or dependent liability.* CLAIMS such as those based on vicarious liability, failure to supervise, or negligent referral are related to the CLAIMS on which they are based.
  - b. *Same transactions or occurrences.* Multiple CLAIMS arising out of the same transaction or occurrence or series of transactions or occurrences are related. However, with regard to this Subsection b only, the PLF will not treat the CLAIMS as related if:
    - (1) The participating COVERED PARTIES acted independently of one another;
    - (2) They represented different clients or groups of clients whose interests were adverse; and
    - (3) The claimants do not rely on any common theory of liability or damage.
  - c. *Alleged scheme or plan.* If claimants ~~attempt to~~ tie together different acts as part of an alleged overall scheme or operation, then the CLAIMS are related.
  - d. *Actual pattern or practice.* Even if a scheme or practice is not alleged, CLAIMS that arise from a method, pattern, or practice in fact used or adopted by one or more COVERED PARTIES or LAW ENTITIES in representing multiple clients in similar matters are related.
  - e. *One loss.* When successive or collective errors each cause or contribute to single or multiple clients' and/or claimants' harm or cumulatively enhance their damages or losses, then the CLAIMS are related.
  - f. *Class actions.* All CLAIMS alleged as part of a class action or purported class action are

related.

## COMMENTS

**SAME OR RELATED CLAIMS.** Each PLF Plan sets a maximum limit of coverage per year. This limit defines the PLF's total maximum obligation under the terms of each Plan issued by the PLF. However, absent additional Plan provisions, numerous circumstances could arise in which the PLF, as issuer of other PLF Plans, would be liable beyond the limits specified in one individual Plan. For example, Plans issued to the same attorney in different PLAN YEARS might apply. Or, Plans issued to different attorneys might all apply. In some circumstances, the PLF ~~intends to may~~ extend a separate limit under each Plan. In other circumstances, when the CLAIMS are related, the PLF ~~does not so intend~~ will not extend separate limits under each Plan. Because the concept of "relatedness" is broad and factually based, there is no one definition or rule that will apply to every situation. The PLF has therefore elected to explain its intent by listing certain circumstances in which only one limit is available regardless of the number of Plans that may apply. See Subsections 14.a to 14.f above. To aid in interpretation, the following are examples of SAME OR RELATED CLAIMS:

*Example No. 1: Attorney A is an associate in a firm and commits malpractice. CLAIMS are made against Attorney A and various partners in the firm. All attorneys share one limit. CLAIMS such as those based on vicarious liability, failure to supervise, or negligent referral are always related to the CLAIMS on which they are based. See Subsection 14.a above. Even if Attorney A and some of the other lawyers are at different firms at the time of the CLAIM, all attorneys and the firm share one Limit of Coverage and one CLAIMS EXPENSE ALLOWANCE.*

*Example No. 2: Attorney A writes a tax opinion for an investment offering, and Attorneys B and C, with a different law firm, assemble the offering circular. Investors 1 and 2 bring CLAIMS in 2010 and Investor 3 brings a CLAIM in 2011 relating to the offering. No CLAIM is asserted prior to 2010. Only one Limit of Coverage applies to all CLAIMS. This is because the CLAIMS arise out of the same transaction or occurrence, or series of transactions or occurrences. See Subsection 14.b above. CLAIMS by investors in the same or similar investments will almost always be related. However, because the CLAIMS in this example are made against COVERED PARTIES in two different firms, up to two CLAIMS EXPENSE ALLOWANCES may potentially apply. See Section VI.2. Note also that, under these facts, all CLAIMS against Attorneys A, B, and C are treated as having been first made in 2010, pursuant to Section IV.1.b(2). This could result in available limits having been exhausted before a CLAIM is eventually made against a particular COVERED PARTY. The timing of making CLAIMS does not increase the available limits.*

*Example No. 3: Attorneys A and B represent husband and wife, respectively, in a divorce. Husband sues A for malpractice in litigating his prenuptial agreement. Wife sues B for not getting her proper custody rights over the children. A's and B's CLAIMS are not related. A's and B's CLAIMS would be related, but for the exception in the second sentence of Subsection 14.b above.*

*Example No. 4: An owner sells his company to its employees by selling shares to two employee benefit plans set up for that purpose. The plans and/or their members sue the company, its outside corporate counsel A, its ERISA lawyer B, the owner, his attorney C, and the plans' former attorney D, contending there were improprieties in the due diligence, the form of the agreements, and the amount and value of shares issued. The defendants file cross-claims. All CLAIMS are related. ~~They~~ They arise out of the same transactions or occurrences and therefore are related under Subsection 14.b. For the exception in Subsection 14.b to apply, all three elements must be satisfied. The exception does not apply because the claimants rely on common theories of liability. In*

addition, the exception may not apply because not all interests were adverse, theories of damages are common, or the attorneys did not act independently of one another. Finally, even if the exception in Subsection 14.b did apply, the CLAIMS would still be related under Subsection 14.d because they involve one loss. Although the CLAIMS are related, if all four attorneys' firms are sued, depending on the circumstances, up to four total CLAIMS EXPENSE ALLOWANCES might be available under Section VI.2.

Example No. 5: Attorney F represents an investment manager for multiple transactions over multiple years in which the manager purchased stocks in Company A on behalf of various groups of investors. Attorneys G and H represent different groups of investors. Attorney J represents Company A. Attorneys F, G, H, and J are all in different firms. They are all sued by the investors for securities violations arising out of this group of transactions. ~~Although the different acts by different lawyers at different times could legitimately be viewed as separate and unconnected, the claimant in this example attempts to tie them together as part of an alleged overall scheme or operation.~~ The CLAIMS are related because the claimants have made them so. See Subsection 14.c above. This will often be the case in securities CLAIMS. As long as such allegations remain in the case, only one limit will be available, even if alternative CLAIMS are also alleged. In this example, although there is only one Limit of Coverage available for all CLAIMS, depending on the circumstances, multiple CLAIMS EXPENSE ALLOWANCES might be available. See Section VI.2.

Example No. 6: Attorneys A, B, and C in the same firm represent a large number of asbestos clients over ten years' time, using a firm-wide formula for evaluating large numbers of cases with minimum effort. They are sued by certain clients for improper evaluation of their cases' values, although the plaintiffs do not allege a common scheme or plan. Because the firm in fact operated a firm-wide formula for handling the cases, the CLAIMS are related based on the COVERED PARTIES' own pattern or practice. The CLAIMS are related because the COVERED PARTIES' own conduct has made them so. See Subsection 14.d above. Attorneys A, B, and C will share one Limit of Coverage and one CLAIMS EXPENSE ALLOWANCE. LAW ENTITIES should protect themselves from such CLAIMS brought by multiple clients by purchasing adequate excess insurance.

Example No. 7: Attorney C represents a group of clients at trial and commits certain errors. Attorney D of the same firm undertakes the appeal, but fails to file the notice of appeal on time. Attorney E is hired by clients to sue Attorneys C and D for malpractice, but misses the statute of limitations. Clients sue all three attorneys. The CLAIMS are related and only a single Limit of Coverage applies to all CLAIMS. See Subsection 14.e above. When, as in this example, successive or collective errors each cause single or multiple clients and/or claimants harm or cumulatively enhance their damages or losses, then the CLAIMS are related. In such a situation, a claimant or group of claimants cannot increase the limits potentially available by alleging separate errors by separate attorneys. Attorney E, however, may be entitled to a CLAIMS EXPENSE ALLOWANCE separate from the one shared by C and D.

Example No. 8: Attorneys A, B, and C in the same firm represent a large banking institution. They are sued by the bank's customers in a class action lawsuit for their part in advising the bank on allegedly improper banking practices. All CLAIMS are related. No class action or purported class action can ever trigger more than one Limit of Coverage. See Subsection 14.f above.

**15.** "SUIT" means a civil proceeding in which DAMAGES are alleged. SUIT includes an arbitration or alternative dispute resolution proceeding to which the COVERED PARTY submits with the consent of the PLF.



16. "YOU" and "YOUR" mean the Named Party shown in the Declarations.

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## SECTION II — WHO IS A COVERED PARTY

1. The following are COVERED PARTIES:
- a. YOU.
  - b. In the event of YOUR death, adjudicated incapacity, or bankruptcy, YOUR conservator, guardian, trustee in bankruptcy, or legal or personal representative, but only when acting in such capacity.
  - c. Any attorney or LAW ENTITY legally liable for YOUR COVERED ACTIVITIES, but only to the extent such legal liability arises from YOUR COVERED ACTIVITIES.
2. Notwithstanding Subsection 1, no business enterprise (except a LAW ENTITY) or any partner, proprietor, officer, director, stockholder, or employee of such business enterprise is a COVERED PARTY.

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## SECTION III — WHAT IS A COVERED ACTIVITY

The following are COVERED ACTIVITIES, if the acts, errors, or omissions occur during the COVERAGE PERIOD; or prior to the COVERAGE PERIOD, if on the effective date of this Plan YOU have no knowledge that any CLAIM has been asserted arising out of such prior act, error, or omission, and there is no prior policy or Plan that provides coverage for such liability or CLAIM resulting from the act, error, or omission, whether or not the available limits of liability of such prior policy or Plan are sufficient to pay any liability or CLAIM:

~~{YOUR CONDUCT}~~

1. Your Conduct. Any act, error, or omission committed by YOU that satisfies all of the following criteria:
- a. YOU committed the act, error, or omission in rendering professional services in YOUR capacity as an attorney in private practice, or in failing to render professional services that should have been rendered in YOUR capacity as an attorney in private practice.
  - b. At the time YOU rendered or failed to render these professional services:
    - (1) YOUR principal office was located in the State of Oregon;
    - (2) YOU were licensed to practice law in the State of Oregon; and
    - (3) Such activity occurred after any Retroactive Date shown in the Declarations.

~~{CONDUCT OF OTHERS}~~

2. **Conduct of Others.** Any act, error, or omission committed by a person for whose conduct YOU are legally liable in YOUR capacity as an attorney, provided at the time of the act, error, or omission each of the following criteria was satisfied:

- a. The act, error, or omission causing YOUR liability:
  - (1) Arose while YOU were licensed to practice law in the State of Oregon;
  - (2) Arose while YOUR principal office was located in the State of Oregon; and
  - (3) Occurred after any Retroactive Date shown in the Declarations.
- b. The act, error, or omission, if committed by YOU, would constitute the rendering of professional services in YOUR capacity as an attorney in private practice.
- c. The act, error, or omission was not committed by an attorney who at the time of the act, error, or omission:
  - (1) Maintained his or her principal office outside the State of Oregon; or
  - (2) Maintained his or her principal office within the State of Oregon and either:
    - (a) Claimed exemption from participation in the Professional Liability Fund, or
    - (b) Was not an active member of the Oregon State Bar.

~~{YOUR CONDUCT IN A SPECIAL CAPACITY}~~

3. **Your Conduct in a Special Capacity.** Any act, error, or omission committed by YOU in YOUR capacity as a personal representative, administrator, conservator, executor, guardian, guardian *ad litem*, special representative pursuant to ORS 128.179, or trustee (except BUSINESS TRUSTEE); provided that the act, error, or omission arose out of a COVERED ACTIVITY as defined in Subsections 1 and 2 above, and the CLAIM is brought by or for the benefit of a beneficiary of the special capacity relationship and arises out of a breach of that relationship.

#### COMMENTS

*To qualify for coverage, a CLAIM must arise out of a COVERED ACTIVITY. The definition of COVERED ACTIVITY imposes a number of restrictions on coverage including the following:*

***Principal Office.*** *To qualify for coverage, a COVERED PARTY'S "principal office" must be located in the State of Oregon at the time specified in the definition. "Principal office" as used in the Plan has the same definition as provided in ORS 9.080(2)(c). For further clarification, see PLF Board of Directors Policy 3.180 (available on the PLF website, [www.osbplf.org](http://www.osbplf.org) or telephone the PLF to request a copy).*

***Prior CLAIMS.*** *Section III limits the definition of COVERED ACTIVITY with respect to acts,*

errors, or omissions that happen prior to the COVERAGE PERIOD, so that no coverage is granted when there is prior knowledge or prior insurance. For illustration of the application of this language, see *Chamberlin v. Smith*, 140 Cal Rptr 493 (1977).

~~To the extent there is prior insurance or other coverage applicable to the CLAIM, it is reasonable to omit the extension of further coverage. Likewise, to the extent YOU have knowledge that particular acts, errors, or omissions have given rise to a CLAIM, it is reasonable that that CLAIM and other CLAIMS arising out of such acts, errors, or omissions would not be covered. Such CLAIMS should instead be covered under the policy or PLF PLAN in force, if any, at the time the first such CLAIM was made.~~

**Types of Activity.** COVERED ACTIVITIES have been divided into three categories. Subsection 1 deals with coverage for YOUR conduct as an attorney in private practice. Subsection 2 deals with coverage for YOUR liability for the conduct of others. Subsection 3 deals with coverage for YOUR conduct in a special capacity (e.g., as a personal representative of an estate). The term "BUSINESS TRUSTEE" as used in this section is defined in Section I.

**Professional Services.** To qualify for coverage under Section III.1 and III.2.b, the act, error or omission causing YOUR liability must be committed "in rendering professional services in YOUR capacity as an attorney, or in failing to render professional services that should have been rendered in YOUR capacity as an attorney." This language limits coverage to those activities commonly regarded as the rendering of professional services as a lawyer. This language, in addition to limiting coverage to YOUR conduct as a lawyer, is expressly intended to limit the definition of COVERED ACTIVITY so that it does not include YOUR conduct in carrying out the commercial or administrative aspects of law practice. Examples of commercial or administrative activities could include: collecting fees or costs; guaranteeing that the client will pay third parties (e.g., court reporters, experts or other vendors) for services provided; depositing, endorsing or otherwise transferring negotiable instruments; depositing or withdrawing monies or instruments into or from trust accounts; or activities as a trustee that require no specialized legal skill or training, such as paying bills on time or not incurring unnecessary expenses. The foregoing list of commercial or administrative activities is not exclusive, but rather is illustrative of the kinds of activities that are regarded as part of the commercial aspect of law practice (not covered), as opposed to the rendering of professional services (covered).

**Example.** A client purports to hire the Covered Party and provides the Covered Party with a cashier's check, which the Covered Party deposits into her firm's client trust account. The Covered Party, on the client's instructions, wire-transfers some of the proceeds of the cashier's check to a third party. The cashier's check later turns out to be forged and the funds transferred out of the trust account belonged to other clients. The Covered Party is later sued by a third party such as a bank or other client arising out of the improper transfer of funds. The Covered Party's conduct is not covered under her PLF Plan. Placing, holding or disbursing funds in lawyer trust accounts are not considered professional services for purposes of the PLF Plan.

**Special Capacity.** Subsection 3 provides limited coverage for YOUR acts as a personal representative, administrator, conservator, executor, guardian, or trustee. However, not all acts in a special capacity are covered under this Plan. Attorneys acting in a special capacity, as described in Subsection III.3 may subject themselves to claims from third parties that are beyond the coverage provided by this Plan. For example, in acting as a conservator or personal representative, an attorney may engage in certain business activities, such as terminating an employee or signing a contract. If such

actions result in a claim by the terminated employee or the other party to the contract, the estate or corpus should respond to such claims in the first instance, and should protect the attorney in the process. Attorneys engaged in these activities should obtain appropriate commercial general liability, errors and omissions, or other commercial coverage. The claim will not be covered under Subsection III.3.

The Plan ~~purposefully~~ uses the term "special capacity" rather than "fiduciary" in Subsection 3 to avoid any implication that this coverage includes fiduciary obligations other than those specifically identified. There is no coverage for YOUR conduct under Subsection 3 unless YOU were formally named or designated as a personal representative, administrator, conservator, executor, guardian, or trustee (except BUSINESS TRUSTEE) and served in such capacity.

**Ancillary Services.** Some law firms ~~are now branching out and providing~~ provide their clients with ancillary services, either through their own lawyers and staff or through affiliates. These ancillary services ~~can~~ may include such activities as architectural and engineering consulting, counseling, financial and investment services, lobbying, marketing, advertising, trade services, public relations, real estate development and appraisal, and other services. Only CLAIMS arising out of services falling within the definition of COVERED ACTIVITY will be covered under this Plan. For example, a lawyer-lobbyist engaged in the private practice of law, including conduct such as advising a client on lobbying reporting requirements or drafting or interpreting proposed legislation, would be engaged in a COVERED ACTIVITY and would be covered. Generally, however, ancillary services will not be covered because of this requirement.

The term "BUSINESS TRUSTEE" is used in SECTION III.3 and in SECTION V.5. This covers the ordinary range of activities in which attorneys in the private practice of law are typically engaged. The Plan does not cover BUSINESS TRUSTEE activities as defined in this Subsection. Examples of types of BUSINESS TRUSTEE activities for which coverage is excluded under the Plan include, among other things: serving on the board of trustees of a charitable, educational, or religious institution; serving as the trustee for a real estate or other investment syndication; serving as trustee for the liquidation of any business or institution; and serving as trustee for the control of a union or other institution.

Attorneys who engage in BUSINESS TRUSTEE activities as defined in this Subsection are encouraged to obtain appropriate insurance coverage from the commercial market for their activities.

**Retroactive Date and Prior Acts.** Section III introduces the concept of a Retroactive Date. No Retroactive Date will apply to any attorney who has held coverage with the PLF continuously since the inception of the PLF. Attorneys who first obtained coverage with the PLF at a later date and attorneys who have interrupted coverage will find a Retroactive Date in the Declarations. This date will be the date on which YOUR most recent period of continuous coverage commenced. This Plan does not cover CLAIMS arising out of conduct prior to the Retroactive Date.

## SECTION IV — GRANT OF COVERAGE

### 1. Indemnity.

- a. The PLF will pay those sums that a COVERED PARTY becomes legally obligated to pay as DAMAGES because of CLAIMS arising out of a COVERED ACTIVITY to which this Plan applies. No other obligation or liability to pay sums or perform acts or services is covered

unless specifically provided for under Subsection 2 - Defense.

**b.** This Plan applies only to CLAIMS first made against a COVERED PARTY during the COVERAGE PERIOD.

**(1)** The applicable COVERAGE PERIOD for a CLAIM will be the earliest of:

**(a)** When a lawsuit is filed or an arbitration or ADR proceeding is formally initiated; or

**(b)** When notice of a CLAIM is received by any COVERED PARTY or by the PLF; or

**(c)** When the PLF first becomes aware of facts or circumstances that reasonably could be expected to be the basis of a CLAIM; or

**(d)** When a claimant intends to make a CLAIM but defers assertion of the CLAIM for the purpose of obtaining coverage under a later COVERAGE PERIOD and the COVERED PARTY knows or should know that the COVERED ACTIVITY that is the basis of the CLAIM could result in a CLAIM.

**(2)** Two or more CLAIMS that are SAME OR RELATED CLAIMS, whenever made, will all be deemed to have been first made at the time the earliest such CLAIM was first made. This provision will apply to YOU only if YOU have coverage from any source applicable to the earliest such SAME OR RELATED CLAIM (whether or not the available limits of liability of such prior policy or plan are sufficient to pay any liability or CLAIM).

**c.** This Plan applies only to SUITS brought in the United States, its territories or possessions, Canada, or the jurisdiction of any Indian Tribe in the United States. This Plan does not apply to SUITS brought in any other jurisdiction, or to SUITS brought to enforce a judgment rendered in any jurisdiction other than the United States, its territories or possessions, Canada, or the jurisdiction of any Indian Tribe in the United States.

**d.** The amount the PLF will pay for damages is limited as described in SECTION VI.

## **2. Defense.**

**a.** Until the CLAIMS EXPENSE ALLOWANCE and the Limits of Coverage extended by this Plan are exhausted, the PLF will defend any SUIT against a COVERED PARTY seeking DAMAGES to which this coverage applies. The PLF has the sole right to investigate, repair, settle, designate defense attorneys, and otherwise conduct defense, repair, or prevention of any CLAIM or potential CLAIM.

**b.** With respect to any CLAIM or potential CLAIM the PLF defends or repairs, the PLF will pay all reasonable and necessary CLAIMS EXPENSE ~~incurred~~the PLF may incur. All payments for EXCESS CLAIMS EXPENSE will reduce the Limits of Coverage.

c. If the CLAIMS EXPENSE ALLOWANCE and Limits of Coverage extended by this Plan are exhausted prior to the conclusion of any CLAIM, the PLF may withdraw from further defense of the CLAIM.

#### COMMENTS

**Claims Made Coverage.** As claims made coverage, this Plan applies to CLAIMS first made during the time period shown in the Declarations. CLAIMS first made either prior to or subsequent to that time period are not covered by this Plan, although they may be covered by a prior or subsequent PLF Plan.

**Damages.** This Plan grants coverage only for CLAIMS seeking DAMAGES. There is no coverage granted for other claims, actions, suits, or proceedings seeking equitable remedies such as restitution of funds or property, disgorgement, accountings or injunctions.

~~**When Claim First Made to PLF.** Subsection 1.b(1) of this section is intended to make clear that the earliest of the several events listed determines when the CLAIM is first made. Subsection 1.b(1)(c) adopts an objective, reasonable person standard to determine when the PLF's knowledge of facts or circumstances can rise to the level of a CLAIM for purpose of triggering an applicable COVERAGE PERIOD. This subsection is based solely on the objective nature of information received by the PLF. Covered Parties should thus be aware that any information or knowledge they may have that is not transmitted to the PLF is irrelevant to any determination made under this subsection.~~

If facts or circumstances meet the requirements of subsection 1.b(1)(c), then any subsequent CLAIM that constitutes a SAME OR RELATED CLAIM under Section I.14 will relate back to the COVERAGE PERIOD at the time the original notice of information was provided to the PLF.

**SAME OR RELATED CLAIMS.** Subsection 1.b(2) states a special rule applicable when several CLAIMS arise out of the SAME OR RELATED CLAIMS. Under this rule, all such SAME OR RELATED CLAIMS are considered first made at the time the earliest of the several SAME OR RELATED CLAIMS is first made. Thus, regardless of the number of claimants asserting SAME OR RELATED CLAIMS, the number of PLAN YEARS involved, or the number of transactions giving rise to the CLAIMS, all such CLAIMS are treated as first made in the earliest applicable PLAN YEAR and only one Limit of Coverage and one CLAIMS EXPENSE ALLOWANCE apply. There is an exception to the special rule in Subsection 1.b(2) for COVERED PARTIES who had no coverage (with the PLF or otherwise) at the time the initial CLAIM was made, but this exception does not create any additional Limits of Coverage. Pursuant to Subsection VI.2, only one Limit of Coverage would be available.

**Scope of Duty to Defend.** Subsection 2 defines the PLF's obligation to defend. The obligation to defend continues only until the CLAIMS EXPENSE ALLOWANCE and the Limits of Coverage are exhausted. In that event, the PLF will tender control of the defense to the COVERED PARTY or excess insurance carrier, if any. The PLF's payment of the CLAIMS EXPENSE ALLOWANCE and Limits of Coverage ends all of the PLF's duties.

~~**Control of Defense.** Subsection 2.a allocates to the PLF control of the investigation, settlement, and defense of the CLAIM. See SECTION IX ASSISTANCE, COOPERATION, AND DUTIES OF COVERED PARTY.~~

~~**Costs of Defense.** Subsection 2.b obligates the PLF to pay reasonable and necessary costs of defense. Only those expenses incurred by the PLF or with the PLF's authority are covered.~~

## SECTION V — EXCLUSIONS FROM COVERAGE

### ~~{WRONGFUL CONDUCT EXCLUSIONS}~~

1. **Fraudulent Claim Exclusion.** This Plan does not apply to a COVERED PARTY for any CLAIM in which that COVERED PARTY participates in a fraudulent or collusive CLAIM.
2. **Wrongful Conduct Exclusion.** This Plan does not apply to any of the following CLAIMS, regardless of whether any actual or alleged harm or damages were intended by YOU:
  - (a) any CLAIM arising out of or in any way connected with YOUR actual or alleged criminal act or conduct;
  - (b) any CLAIM based on YOUR actual or alleged dishonest, knowingly wrongful, fraudulent or malicious act or conduct, or to any such act or conduct by another of which YOU had personal knowledge and in which you acquiesced or remained passive;
  - (c) any claim based on YOUR intentional violation of the Oregon Rules of Professional Conduct (ORPC) or other applicable code of professional conduct, or to any such violation of such codes by another of which you had personal knowledge and in which YOU acquiesced or remained passive.
  - (d) This Plan does not apply to any CLAIM based on or arising out of YOUR non-payment of a valid and enforceable lien if actual notice of such lien was provided to YOU, or to anyone employed in YOUR office, prior to payment of the funds to a person or entity other than the rightful lien-holder.

~~This Plan does not apply to any CLAIM based on or arising out of any intentional, dishonest, fraudulent, criminal, malicious, knowingly wrongful, or knowingly unethical acts, errors, or omissions committed by YOU or at YOUR direction or in which YOU acquiesce or remain passive after having personal knowledge thereof.~~

### COMMENTS

*Exclusions 1 and 2 set out the circumstances in which wrongful conduct will eliminate coverage. An intent to harm is not required.*

***Voluntary Exposure to CLAIMS.*** An attorney may sometimes voluntarily expose himself or herself to a CLAIM or known risk through a course of action or inaction when the attorney knows there is a more reasonable alternative means of resolving a problem. For example, an attorney might disburse settlement proceeds to a client even though the attorney knows of valid hospital, insurance company, or PIP liens, or other valid liens or claims to the funds. If the attorney disburses the proceeds to the client and a CLAIM arises from the ~~other claimants,~~ lien holder, Exclusion 2 will apply and the CLAIM will not be covered.

***Unethical Conduct.*** If a CLAIM arises that involves unethical conduct by an attorney, Exclusion 2 may also apply. ~~to the conduct and the CLAIM would therefore not be covered. This can occur, f~~ For example, if an attorney violates Disciplinary Rule ORPC 8.4(a)(3) (engaging in conduct involving

dishonesty, fraud, deceit, or misrepresentation) or ORPC 5.5(a) (aiding a nonlawyer in the unlawful practice of law) and a CLAIM results. Exclusion 2 will apply and the CLAIM will not be covered.

*Example: Attorney A allows a title company to use his name, letterhead, or forms in connection with a real estate transaction in which Attorney A has no significant involvement. Attorney A's activities violate ORPC 8.4(a)(3) and ORPC 5.5(a). A CLAIM is made against Attorney A in connection with the real estate transaction. Because Attorney A's activities fall within the terms of Exclusion 2, there will be no coverage for the CLAIM. In addition, the CLAIM likely would not even be within the terms of the coverage grant under this Plan because the activities giving rise to the CLAIM do not fall within the definition of a COVERED ACTIVITY. The same analysis would apply if Attorney A allowed an insurance or investment company to use his name, letterhead, or forms in connection with a living trust or investment transaction in which Attorney A has no significant involvement.*

**3. Disciplinary Proceedings Exclusion.** This Plan does not apply to any CLAIM based on or arising out of a proceeding brought against YOU by the Oregon State Bar or any similar entity.

**4. Punitive Damages and Cost Award Exclusions.** This Plan does not apply to:

- a. The part of any CLAIM seeking punitive, exemplary or statutorily enhanced damages; or
- b. Any CLAIM for or arising out of the imposition of attorney fees, costs, fines, penalties, or other sanctions imposed under any federal or state statute, administrative rule, court rule, or case law intended to penalize bad faith conduct, false or unwarranted certification in a pleading, ~~and~~ or the assertion of frivolous or bad faith claims or defenses. The PLF will defend the COVERED PARTY against such a CLAIM, but any liability for indemnity arising from such CLAIM will be excluded.

#### COMMENTS

*A COVERED PARTY may become subject to punitive or exemplary damages, attorney fees, costs, fines, penalties, or other sanctions in two ways. The COVERED PARTY may have these damages assessed directly against the COVERED PARTY or the COVERED PARTY may have a client or other person sue the COVERED PARTY for indemnity for causing the client to be subjected to these damages.*

*Subsection a of Exclusion 4 applies to direct actions for punitive, exemplary or enhanced damages. It excludes coverage for that part of any CLAIM asserting such damages. In addition, such CLAIMS do not involve covered DAMAGES as defined in this Plan. If YOU are sued for punitive damages, YOU are not covered for that exposure. Similarly, YOU are not covered to the extent compensatory damages are doubled, trebled or otherwise enhanced.*

*Subsection b of Exclusion 4 applies to both direct actions against a COVERED PARTY and actions for indemnity brought by others. It excludes coverage for any monetary sanction arising from an ~~The courts have become increasingly intolerant of attorney's' improper conduct in actions in several areas including~~ trial practice, discovery, and conflicts of interest, such as is described in ORCP 17 and FRCP11. ~~Statutes, court rules, and common law approaches imposing various monetary sanctions have been developed to deter such inappropriate conduct. The purpose of these sanctions would be threatened if the PLF were to indemnify the guilty attorney and pay the cost of indemnification out of the assessments paid by all attorneys.~~*

*Thus, if YOU cause YOUR client to be subjected to a punitive damage award (based upon the*



client's wrongful conduct toward the claimant) because of a failure, for example, to assert a statute of limitations defense, the PLF will cover YOUR liability for the punitive damages suffered by YOUR client. Subsection a does not apply because the action is not a direct action for punitive damages and Subsection b does not apply because the punitive damages suffered by YOUR client are not the type of damages described in Subsection b.

On the other hand, if YOU cause YOUR client to be subjected to an award of attorney fees, costs, fines, penalties, or other sanctions imposed because of YOUR conduct, or such an award is made against YOU, Subsection b applies and the CLAIM for such damages (or for any related consequential damages) will be excluded.

~~[BUSINESS ACTIVITY EXCLUSIONS]~~

**5. Business Role Exclusion.** This Plan does not apply to that part of any CLAIM based on or arising out of YOUR conduct as an officer, director, partner, BUSINESS TRUSTEE, employee, shareholder, member, or manager of any entity except a LAW ENTITY.

*COMMENTS*

A COVERED PARTY, in addition to his or her role as an attorney, may act as an officer, director, partner, BUSINESS TRUSTEE, employee, shareholder, member, or manager of an entity. This exclusion eliminates coverage for the COVERED PARTY'S liability while acting in these capacities. However, the exclusion does not apply if the liability is based on such status in a LAW ENTITY.

**6. Business Ownership Interest Exclusion.** This Plan does not apply to any CLAIM ~~by or on behalf of~~based on or arising out of any business enterprise:

- a. In which YOU have an ownership interest, or in which YOU had an ownership interest at the time of the alleged acts, errors, or omissions on which the CLAIM is based;
- b. In which YOU are a general partner, managing member, or employee, or in which YOU were a general partner, managing member, or employee at the time of the alleged acts, errors, or omissions on which the CLAIM is based; or
- c. That is controlled, operated, or managed by YOU, either individually or in a fiduciary capacity, including the ownership, maintenance, or use of any property in connection therewith, or was so controlled, operated, or managed by YOU at the time of the alleged acts, errors, or omissions on which the CLAIM is based.

Ownership interest, for the purpose of this exclusion, does not include an ownership interest now or previously held by YOU solely as a passive investment, as long as YOU, those YOU control, YOUR spouse, parent, step-parent, child, step-child, sibling, or any member of YOUR household, and those with whom YOU are regularly engaged in the practice of law, collectively now own or previously owned an interest of 10 percent or less in the business enterprise.

*COMMENTS*

~~Intimacy with a client can increase risk of loss in two ways: (1) The attorney's services may be rendered in a more casual and less thorough manner than if the services were extended at arm's length; and (2) After a loss, the attorney may feel particularly motivated to assure the client's recovery. While the PLF is cognizant of a natural desire of attorneys to serve those with whom they are closely connected, the PLF has determined that coverage for such services should be excluded. Exclusion 6 delineates the level of intimacy required to defeat coverage. See also Exclusion 11.~~

7. **Partner and Employee Exclusion.** This Plan does not apply to any CLAIM made by:
- a. YOUR present, former, or prospective partner, employer, or employee; or
  - b. A present, former, or prospective officer, director, or employee of a professional corporation in which YOU are or were a shareholder,

unless such CLAIM arises out of YOUR conduct in an attorney-client capacity for one of the parties listed in Subsections a or b.

#### COMMENTS

*The PLF does not always cover YOUR conduct in relation to YOUR past, present, or prospective partners, employers, employees, and fellow shareholders, even if such conduct arises out of a COVERED ACTIVITY. Coverage is limited by this exclusion to YOUR conduct in relation to such persons in situations in which YOU are acting as their attorney and they are YOUR client.*

8. **ORPC 1.8 Exclusion.** This Plan does not apply to any CLAIM based on or arising out of any business transaction subject to ORPC 1.8(a) or its equivalent in which YOU participate with a client unless any required written disclosure has been properly executed in compliance with that rule in the form of Disclosure Form ORPC 1 (attached as Exhibit A to this Plan) and has been properly fully executed by YOU and YOUR client prior to the ~~occurrence~~ business transaction giving rise to the CLAIM, ~~and either:~~

~~a. A copy of the executed disclosure form is forwarded to the PLF within 10 calendar days of execution; or~~

~~b. If delivery of a copy of the disclosure form to the PLF within 10 calendar days of execution would violate ORPC 1.6, ORS 9.460(3), or any other rule governing client confidences and secrets, YOU may instead send the PLF an alternative letter stating: (1) the name of the client with whom YOU are participating in a business transaction; (2) that YOU have provided the client with a disclosure letter pursuant to the requirements of ORPC 1.0(g) and 1.8(a); (3) the date of the disclosure letter; and (4) that providing the PLF with a copy of the disclosure letter at the present time would violate applicable rules governing client confidences and secrets. This alternative letter must be delivered to the PLF within 10 calendar days of execution of the disclosure letter.~~

#### COMMENTS

~~**ORPC 1.** Form ORPC 1, referred to above, is attached to this Plan following SECTION XV. The form includes an explanation of ORPC 1.8(a) which should be provided to the client involved in the business transaction.~~

~~———— **Applicability of Exclusion.** When an attorney engages in a business transaction with a client, the attorney has an ethical duty to make certain disclosures to the client. ORPC 1.0(g) and 1.8(a) provide:~~

~~**RULE 1.8 CONFLICT OF INTEREST: CURRENT CLIENTS: SPECIFIC RULES**~~

~~—(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to client unless:~~

~~———— (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;~~

~~———— (2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and~~

~~———— (3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.~~

~~**RULE 1.0(g)**~~

~~(g) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct. When informed consent is required by these Rules to be confirmed in writing or to be given in a writing signed by the client, the lawyer shall give and the writing shall reflect a recommendation that the client seek independent legal advice to determine if consent should be given.~~

~~This exclusion is not intended to be an interpretation of ORPC 1.8(a). Instead, the Plan is invoking invokes the body of law interpreting ORPC 1.8(a) to define when the exclusion is applicable.~~

~~**Use of the PLF's Form Not Mandated.** Because of the obvious conflict of interest and the high duty placed on attorneys, when the exclusion applies, the attorney is nearly always at risk of being liable when things go wrong. The only effective defense is to show that the attorney has made full disclosure, which includes a sufficient explanation to the client of the potential adverse impact of the differing interests of the parties to make the client's consent meaningful. Form ORPC 1 is the PLF's attempt to set out an effective disclosure which will provide an adequate defense to such CLAIMS. The PLF is sufficiently confident that this disclosure will be effective to agree that the exclusion will not apply if YOU use the PLF's proposed form. YOU are free to use YOUR own form in lieu of the PLF's form, but if YOU do so YOU proceed at YOUR own risk, i.e., if YOUR disclosure is less effective than the PLF's disclosure form, the exclusion will apply. Use of the PLF's form is not intended to assure YOU of compliance with the ethical requirements applicable to YOUR particular circumstances. It is YOUR responsibility to consult ORPC 1.0(g) and 1.8(a) and add any disclosures necessary to satisfy the disciplinary rules.~~

~~———— **Timing of Disclosure.** To be effective, it is important that the PLF can prove the disclosure was made prior to entering into the business transaction. Therefore, the disclosure should be reduced to writing and signed prior to entering into the transaction. There may be limited situations in which reducing the required disclosure to writing prior to entering into the transaction is impractical. In those~~

~~circumstances, execution of the disclosure letter after entry into the transaction will not render the exclusion effective provided the execution takes place while the client still has an opportunity to withdraw from the transaction and the effectiveness of the disclosure is not compromised. Additional language may be necessary to render the disclosure effective in these circumstances.~~

~~— **Delivery to the PLF.** Following execution of the disclosure letter, a copy of the letter or an alternative letter must be delivered to the PLF in a timely manner. Failure to do so will result in any subsequent CLAIM against YOU being excluded.~~

~~— **Other Disclosures.** By its terms, ORPC 1.8(a) and this exclusion apply only to business transactions with a client in which the client expects the lawyer to exercise the lawyer's professional judgment therein for the protection of the client. However, lawyers frequently enter into business transactions with others not recognizing that the other expects the lawyer to exercise professional judgment for his or her protection. It can be the "client's" expectation and not the lawyer's recognition that triggers application of ORPC 1.8(a) and this exclusion.~~

~~Whenever YOU enter into a business transaction with a client, former client, or any other person, YOU should make it clear in writing at the start for YOUR own protection whether or not YOU will also be providing legal services or exercising YOUR professional judgment for the protection of other persons involved in the transaction (or for the business entity itself). Avoiding potential misunderstandings up front can prevent difficult legal malpractice CLAIMS from arising later.~~

9. **Investment Advice Exclusion.** This Plan does not apply to any CLAIM based on or arising out of any act, error, or omission committed by YOU (or by someone for whose conduct YOU are legally liable) while in the course of rendering INVESTMENT ADVICE if the INVESTMENT ADVICE is in fact either the sole cause or a contributing cause of any resulting damage. However, if all INVESTMENT ADVICE rendered by YOU constitutes a COVERED ACTIVITY described in Section III.3, this exclusion will not apply unless part or all of such INVESTMENT ADVICE is described in Subsections d, e, f, or g of the definition of INVESTMENT ADVICE in Section I.10.

#### COMMENTS

~~In prior years, the PLF suffered extreme losses as a result of COVERED PARTIES engaging in INVESTMENT ADVICE activity. It was never intended that the Plan cover such activities. An INVESTMENT ADVICE exclusion was added to the Plan in 1984. Nevertheless, losses continued in situations where the COVERED PARTY had rendered both INVESTMENT ADVICE and legal advice. In addition, some CLAIMS resulted where the attorney provided INVESTMENT ADVICE in the guise of legal advice.~~

~~Exclusion 9, first introduced in 1987, represented a totally new approach to this problem. Instead of excluding all INVESTMENT ADVICE, the PLF Plan has clearly delineated specific activities which-that will not be covered, whether or not legal as well as INVESTMENT ADVICE is involved. These specific activities are defined in Section I.10 under the definition of INVESTMENT ADVICE. The PLF's choice of delineated activities was guided by specific cases that exposed the PLF in situations never intended to be covered. The PLF is cognizant Plan takes into account that COVERED PARTIES doing structured settlements and COVERED PARTIES in business practice and tax practice legitimately engage in the rendering of general INVESTMENT ADVICE as a part of their practices. In delineating the activities to be excluded, the PLF Plan has attempted to retains coverage for these legitimate practices. For example, the last sentence of the exclusion permits coverage for certain activities normally undertaken by conservators and personal representatives (i.e., COVERED~~

ACTIVITIES described in Section III.3) when acting in that capacity even though the same activities would not be covered if performed in any other capacity. See the definition of INVESTMENT ADVICE in Section I.10.

Exclusion 9 applies whether the COVERED PARTY is directly or vicariously liable for the INVESTMENT ADVICE.

~~Note that~~ Exclusion 9 could defeat coverage for an entire CLAIM even if only part of the CLAIM involved INVESTMENT ADVICE. If INVESTMENT ADVICE is in fact either the sole or a contributing cause of any resulting damage that is part of the CLAIM, the entire CLAIM is excluded.

~~[PERSONAL RELATIONSHIP AND BENEFITS EXCLUSIONS]~~

**10. Law Practice Business Activities or Benefits Exclusion.** This Plan does not apply to any CLAIM:

- a. For any amounts paid, incurred or charged by any COVERED PARTY, as fees, costs, or disbursements, (or by any LAW ENTITY with which the COVERED PARTY was associated at the time the fees, costs or expenses were paid, incurred or charged), including but not limited to fees, costs and disbursements alleged to be excessive, not earned, or negligently incurred, whether claimed as restitution of specific funds, forfeiture, financial loss, set-off or otherwise.
- b. Arising from or relating to the negotiation, securing, or collection of fees, costs, or disbursements owed or claimed to be owed to a COVERED PARTY or any LAW ENTITY with which the COVERED PARTY is now associated, or was associated at the time of the conduct giving rise to the CLAIM; or
- c. For damages or the recovery of funds or property that have or will directly or indirectly benefit any COVERED PARTY.

In the event the PLF defends any claim or suit that includes any claim within the scope of this exclusion, it will have the right to settle or attempt to dismiss any other claim(s) not falling within this exclusion, and to withdraw from the defense following the settlement or dismissal of any such claim(s).

This exclusion does not apply to any CLAIM based on an act, error or omission by the COVERED PARTY regarding the client's right or ability to recover fees, costs, or expenses from an opposing party, pursuant to statute or contract.

- ~~a. For the return of any fees, costs, or disbursements paid to a COVERED PARTY (or paid to any other attorney or LAW ENTITY with which the COVERED PARTY was associated at the time the fees, costs, or disbursements were incurred or paid), including but not limited to fees, costs, and disbursements alleged to be excessive, not earned, or negligently incurred;~~
- ~~b. Arising from or relating to the negotiation, securing, or collection of fees, costs, or disbursements owed or claimed to be owed to a COVERED PARTY or any LAW ENTITY with which the COVERED PARTY is now associated, or was associated at the time of the conduct giving rise to the CLAIM; or~~

~~e. For damages or the recovery of funds or property that have or will directly or indirectly benefit any COVERED PARTY.~~

## COMMENTS

~~This Plan is intended to cover liability for errors committed in rendering professional services. It is not intended to~~ does not cover liabilities arising out of the business aspects of the practice of law. Here, the Plan clarifies this distinction by excluding liabilities arising out of fee disputes whether the CLAIM seeks a return of a paid fee, cost, or disbursement. Subsection c, in addition, excludes CLAIMS for damages or the recovery of funds or property that, for whatever reason, have resulted or will result in the accrual of a benefit to any COVERED PARTY.

Attorneys sometimes attempt to correct their own mistakes without notifying the PLF. In some cases, the attorneys charge their clients for the time spent in correcting their prior mistakes, which can lead to a later CLAIM from the client. The better course of action is to notify the PLF of a potential CLAIM as soon as it arises and allow the PLF to hire and pay for repair counsel if appropriate. In the PLF's experience, repair counsel is usually more successful in obtaining relief from a court or an opposing party than the attorney who made the mistake. In addition, under Subsection a of this exclusion, the PLF does not cover CLAIMS from a client for recovery of fees previously paid by the client to a COVERED PARTY (including fees charged by an attorney to correct the attorney's prior mistake).

*Example No. 1: Attorney A sues Client for unpaid fees; Client counterclaims for the return of fees already paid to Attorney A which allegedly were excessive and negligently incurred by Attorney A. Under Subsection a, there is no coverage for the CLAIM.*

*Example No. 2: Attorney B allows a default to be taken against Client, and bills an additional \$2,500 in attorney fees incurred by Attorney B in his successful effort to get the default set aside. Client pays the bill, but later sues Attorney B to recover the fees paid. Under Subsection a there is no coverage for the CLAIM.*

*Example No. 3: Attorney C writes a demand letter to Client for unpaid fees, then files a lawsuit for collection of the fees. Client counterclaims for unlawful debt collection. Under Subsection b, there is no coverage for the CLAIM. The same is true if Client is the plaintiff and sues for unlawful debt collection in response to the demand letter from Attorney C.*

*Example No. 4: Attorney D negotiates a fee and security agreement with Client on behalf of Attorney D's own firm. Other firm members, not Attorney D, represent Client. Attorney D later leaves the firm, Client disputes the fee and security agreement, and the firm sues Attorney D for negligence in representing the firm. Under Subsection b, there is no coverage for the CLAIM.*

*Example No. 5: Attorney E takes a security interest in stock belonging to Client as security for fees. Client fails to pay the fees and Attorney E executes on the stock and becomes the owner. Client sues for recovery of the stock and damages. Under Subsection c, there is no coverage for the CLAIM. The same is true if Attorney E receives the stock as a fee and later is sued for recovery of the stock or damages.*

**11. Family Member and Ownership Exclusion.** This Plan does not apply to: (a) any CLAIM based ~~upon on~~ or arising out of ~~YOUR~~-legal services performed by YOU on behalf of YOUR ~~on behalf of YOUR~~ spouse, parent, step-parent, child, step-child, sibling, or any member of ~~YOUR-YOUR~~ household, or on behalf of a business entity in which any of them, individually or collectively, have a

controlling interest: or (b) any CLAIM against YOU based on or arising out of another lawyer having provided legal services or representation to his or her own spouse, parent, child, step-child, sibling, or any member of his or her household, or on behalf of a business entity in which any of them individually or collectively, have a controlling interest.

#### COMMENT

*Work performed for family members is not covered under this Plan. A CLAIM based upon or arising out of such work, even for example a CLAIM against other lawyers or THE FIRM for failure to supervise, will be excluded from coverage. This exclusion does not apply, however, if one attorney performs legal services for another attorney's family member.*

**12. Benefit Plan Fiduciary Exclusion.** This Plan does not apply to any CLAIM arising out of a COVERED PARTY'S activity as a fiduciary under any employee retirement, deferred benefit, or other similar plan.

**13. Notary Exclusion.** This Plan does not apply to any CLAIM arising out of any witnessing of a signature or any acknowledgment, verification upon oath or affirmation, or other notarial act without the physical appearance before such witness or notary public, unless such CLAIM arises from the acts of YOUR employee and YOU have no actual knowledge of such act.

#### ~~[GOVERNMENT ACTIVITY EXCLUSION]~~

**14. Government Activity Exclusion.** This Plan does not apply to any CLAIM arising out of YOUR conduct:

**a.** As a public official or an employee of a governmental body, subdivision, or agency; or

**b.** In any other capacity that comes within the defense and indemnity requirements of ORS 30.285 and 30.287, or other similar state or federal statute, rule, or case law. If a public body rejects the defense and indemnity of such a CLAIM, the PLF will provide coverage for such COVERED ACTIVITY and will be subrogated to all YOUR rights against the public body.

#### COMMENTS

~~Subsection a excludes coverage for all public officials and government employees. The term "public official" as used in this section does not include part time city attorneys hired on a contract basis. The term "employee" refers to a salaried person. Thus, the exclusion does not apply, for example, to YOU when YOU are hired on an hourly or contingent fee basis so long as the governmental entity does not provide YOU with office facilities, staff, or other indicia of employment.~~

*Subsection a applies whether or not the public official or employee is entitled to defense or indemnity from the governmental entity. Subsection b, in addition, excludes coverage for YOU in other relationships with a governmental entity, but only if statute, rule, or case law entitles YOU to defense or indemnity from the governmental entity.*

#### ~~[HOUSE COUNSEL EXCLUSION]~~

**15. House Counsel Exclusion.** This Plan does not apply to any CLAIM arising out of YOUR conduct as an employee in an employer-employee relationship other than YOUR conduct as an

employee for a LAW ENTITY.

#### COMMENTS

*This exclusion applies to conduct as an employee even when the employee represents a third party in an attorney-client relationship as part of the employment. Examples of this application include employment by an insurance company, labor organization, member association, or governmental entity that involves representation of the rights of insureds, union or association members, clients of the employer, or the employer itself.*

#### ~~[GENERAL TORTIOUS CONDUCT EXCLUSIONS]~~

**16. General Tortious Conduct Exclusions.** This Plan does not apply to any CLAIM against any COVERED PARTY for:

- a. Bodily injury, sickness, disease, or death of any person;
- b. Injury to, loss of, loss of use of, or destruction of any real, personal, or intangible property; or
- c. Mental anguish or emotional distress in connection with any CLAIM described under Subsections a or b.

This exclusion does not apply to any CLAIM made under ORS 419B.010 if the CLAIM arose from an otherwise COVERED ACTIVITY.

#### COMMENTS

~~*The CLAIMS excluded are not typical errors and omissions torts and are, therefore, considered inappropriate for coverage under the Plan. YOU are encouraged to seek coverage for these CLAIMS through commercial insurance markets.*~~

~~*Prior to 1991 the Plan expressly excluded "personal injury" and "advertising injury," defining those terms in a manner similar to their definitions in standard commercial general liability policies. The deletion of these defined terms from this Exclusion is not intended to imply that all personal injury and advertising injury CLAIMS are covered. Instead, the deletion is intended only to permit coverage for personal injury or advertising injury CLAIMS, if any, that fall within the other coverage terms of the Plan.*~~

*Subsection b of this exclusion is intended to encompass a broad definition of property. For these purposes, property includes real, personal and intangible property (e.g. electronic data, financial instruments, money etc.) held by an attorney. However, Subsection b is not intended to apply to the extent the loss or damage of property materially and adversely affects an attorney's performance of professional services, in which event the consequential damages resulting from the loss or damage to property would be covered. For the purposes of this Comment, "consequential damages" means the extent to which the attorney's professional services are adversely affected by the property damage or loss.*

*Example No. 1: Client gives Attorney A valuable jewelry to hold for safekeeping. The jewelry is*



stolen or lost. There is no coverage for the value of the stolen or lost jewelry, since the loss of the property did not adversely affect the performance of professional services. Attorney A can obtain appropriate coverage for such losses from commercial insurance sources.

Example No. 2: Client gives Attorney B a defective ladder from which Client fell. The ladder is evidence in the personal injury case Attorney B is handling for Client. Attorney B loses the ladder. Because the ladder is lost, Client loses the personal injury case. The CLAIM for the loss of the personal injury case is covered. The damages are the difference in the outcome of the personal injury case caused by the loss of the ladder. There would be no coverage for the loss of the value of the ladder. Coverage for the value of the ladder can be obtained through commercial insurance sources.

Example No. 3: Client gives Attorney C important documents relevant to a legal matter being handled by Attorney C for Client. After the conclusion of handling of the legal matter, the documents are lost or destroyed. Client makes a CLAIM for loss of the documents, reconstruction costs, and consequential damages due to future inability to use the documents. There is no coverage for this CLAIM, as loss of the documents did not adversely affect any professional services because the professional services had been completed. Again, coverage for loss of the property (documents) itself can be obtained through commercial general liability or other insurance or through a valuable papers endorsement to such coverage.

~~**Child Abuse Reporting Statute.** This exclusion would ordinarily exclude coverage for the type of damages that might be alleged against an attorney for failure to comply with ORS 419B.010, the child abuse reporting statute. (It is presently uncertain whether civil liability can arise under the statute.) If there is otherwise coverage under this Plan for a CLAIM arising under ORS 419B.010, the PLF will not apply Exclusion 16 to the CLAIM.~~

17. **Unlawful Harassment and Discrimination Exclusion.** This Plan does not apply to any CLAIM based on or arising out of harassment or discrimination on the basis of race, creed, age, religion, sex, sexual ~~preference~~orientation, disability, pregnancy, national origin, marital status, or any other basis ~~prohibited by law.~~

#### COMMENTS

The CLAIMS excluded are not typical errors-and-omissions torts and are, therefore, ~~inappropriate for coverage~~not covered under the Plan.

#### ~~[PATENT EXCLUSION]~~

18. **Patent Exclusion.** This Plan does not apply to any CLAIM based upon or arising out of professional services rendered or any act, error, or omission committed in relation to the prosecution of a patent if YOU were not registered with the U.S. Patent and Trademark Office at the time the CLAIM arose.

19. *Reserved.*

#### ~~———— [CONTRACTUAL OBLIGATION EXCLUSION]~~

20. **Contractual Obligation Exclusion.** This Plan does not apply to any CLAIM:

- a.** Based upon or arising out of any bond or any surety, guaranty, warranty, joint control, or similar agreement, or any assumed obligation to indemnify another, whether signed or otherwise agreed to by YOU or someone for whose conduct YOU are legally liable, unless the CLAIM arises out of a COVERED ACTIVITY described in SECTION III.3 and the person against whom the CLAIM is made signs the bond or agreement solely in that capacity;
- b.** Any costs connected to ORS 20.160 or similar statute or rule;
- c.** For liability based on an agreement or representation, if the Covered Party would not have been liable in the absence of the agreement or representation; or
- d.** Claims in contract based upon an alleged promise to obtain a certain outcome or result.

### COMMENTS

*In the Plan, the PLF agrees to assume certain tort risks of Oregon attorneys for certain errors or omissions in the private practice of law; it does not assume the risk of making good on attorneys' contractual obligations. So, for example, an agreement to indemnify or guarantee an obligation will generally not be covered, except in the limited circumstances described in Subsection a. That subsection is discussed further below in this Comment.*

*Subsection b, while involving a statutory rather than contractual obligation, nevertheless expresses a similar concept, since under ORS 20.160 an attorney who represents a nonresident or foreign corporation plaintiff in essence agrees to guarantee payment of litigation costs not paid by his or her client.*

*Subsection c states the general rule that contractual liabilities are not covered under the PLF Plan. For example, an attorney who places an attorney fee provision in his or her retainer agreement voluntarily accepts the risk of making good on that contractual obligation. Because a client's attorney fees incurred in litigating a dispute with its attorney are not ordinarily damages recoverable in tort, they are not a risk the PLF agrees to assume. In addition, if a Covered Party agrees or represents that he or she will pay a claim, reduce fees, or the like, a claim based on a breach of that agreement or representation will not be covered under the Plan.*

*Subsection d involves a specific type of agreement or representation: an alleged promise to obtain a particular outcome or result. One example of this would be an attorney who promises to get a case reinstated or to obtain a particular favorable result at trial or in settlement. In that situation, the attorney can potentially be held liable for breach of contract or misrepresentation regardless of whether his or her conduct met the standard of care. That situation is to be distinguished from an attorney's liability in tort or under the third party beneficiary doctrine for failure to perform a particular task, such as naming a particular beneficiary in a will or filing and serving a complaint within the statute of limitations, where the liability, if any, is not based solely on a breach of the attorney's guarantee, promise or representation.*

*Attorneys sometimes act in one of the special capacities for which coverage is provided under Section III.3 (i.e., as a named personal representative, administrator, conservator, executor, guardian, or trustee except BUSINESS TRUSTEE). If the attorney is required to sign a bond or any surety, guaranty, warranty, joint control, or similar agreement while carrying out one of these special capacities, Exclusion 20.a does not apply, although b, c, or d of this Exclusion may be applicable.*

*On the other hand, when an attorney is acting in an ordinary capacity not within the provisions of Section III.3, Exclusion 20 does apply to any CLAIM based on or arising out of any bond or any surety, guaranty, warranty, joint control, indemnification, or similar agreement signed by the attorney or by someone for whom the attorney is legally liable. In these situations, attorneys should not sign such bonds or agreements. For example, if an attorney is acting as counsel to a personal representative and the personal representative is required to post a bond, the attorney should resist any attempt by the bonding company to require the attorney to co-sign as a surety for the personal representative or to enter into a joint control or similar agreement that requires the attorney to review, approve, or control expenditures by the personal representative. If the attorney signs such an agreement and a CLAIM is later made by the bonding company, the estate, or another party, Exclusion 20 applies and there will be no coverage for the CLAIM.*

~~{BANKRUPTCY TRUSTEE EXCLUSION}~~

**21. Bankruptcy Trustee Exclusion.** This Plan does not apply to any CLAIM arising out of YOUR activity (or the activity of someone for whose conduct ~~you~~ YOU are legally liable) as a bankruptcy trustee.

~~{CONFIDENTIAL OR PRIVATE DATA EXCLUSION}~~

**22. Confidential or Private Data Exclusion.** This Plan does not apply to any CLAIM arising out of or related to the loss, compromise or breach of or access to confidential or private information or data. If the PLF agrees to defend a SUIT that includes a CLAIM that falls within this exclusion, the PLF will not pay any CLAIMS EXPENSE relating to such CLAIM.

COMMENTS

*There is a growing body of law directed at protecting confidential or private information from disclosure. The protected information or data may involve personal information such as credit card information, social security numbers, drivers licenses, or financial or medical information. They may also involve business-related information such as trade secrets or intellectual property. Examples of loss, compromise, breach or access include but are not limited to electronically stored information or data being inadvertently disclosed or released by a ~~Covered Party~~ COVERED PARTY; being compromised by the theft, loss or misplacement of a computer containing the data; being stolen or intentionally damaged; or being improperly accessed by a ~~Covered Party~~ COVERED PARTY or someone acting on his or her behalf. However, such information or data need not be in electronic format, and a data breach caused through, for example, the improper safeguarding or disposal of paper records would also fall within this exclusion.*

*There may be many different costs incurred to respond to a data breach, including but not limited to notification costs, credit monitoring costs, forensic investigations, computer reprogramming, call center support and/or public relations. The PLF will not pay for any such costs, even if the PLF is otherwise providing a defense.*

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**SECTION VI — LIMITS OF COVERAGE AND  
CLAIMS EXPENSE ALLOWANCE**

## 1. Limits for This Plan

**a. Coverage Limits.** The PLF's maximum liability under this Plan is \$300,000 DAMAGES and EXCESS CLAIMS EXPENSE for all CLAIMS first made during the COVERAGE PERIOD (and during any extended reporting period granted under Section XIV). The making of multiple CLAIMS or CLAIMS against more than one COVERED PARTY will not increase the PLF's Limit of Coverage.

**b. Claims Expense Allowance Limits.** In addition to the Limit of Coverage stated in Section VI.1.a above, there is a single CLAIMS EXPENSE ALLOWANCE of \$50,000 for CLAIMS EXPENSE for all CLAIMS first made during the COVERAGE PERIOD (and during any extended reporting period granted under Section XIV). The making of multiple CLAIMS or CLAIMS against more than one COVERED PARTY will not increase the CLAIMS EXPENSE ALLOWANCE. In the event CLAIMS EXPENSE exceeds the CLAIMS EXPENSE ALLOWANCE, the Limit of Coverage will be reduced by the amount of EXCESS CLAIMS EXPENSE incurred. The CLAIMS EXPENSE ALLOWANCE is not available to pay DAMAGES or settlements.

**c. No Consequential Damages.** No person or entity may recover any damages for breach of any provision in this Plan except those specifically provided for in this Plan.

## 2. Limits Involving Same or Related Claims Under Multiple Plans

If this Plan and one or more other Plans issued by the PLF apply to the SAME OR RELATED CLAIMS, then regardless of the number of claimants, clients, COVERED PARTIES, or LAW ENTITIES involved, only one Limit of Coverage and one CLAIMS EXPENSE ALLOWANCE will apply. Notwithstanding the preceding sentence, if the SAME OR RELATED CLAIMS are brought against two or more separate LAW ENTITIES, each of which requests and is entitled to separate defense counsel, the PLF will make one CLAIMS EXPENSE ALLOWANCE available to each of the separate LAW ENTITIES requesting a separate allowance. For purposes of this provision, whether LAW ENTITIES are separate is determined as of the time of the COVERED ACTIVITIES that are alleged in the CLAIMS. No LAW ENTITY, or group of LAW ENTITIES practicing together as a single firm, will be entitled to more than one CLAIMS EXPENSE ALLOWANCE under this provision. The CLAIMS EXPENSE ALLOWANCE granted will be available solely for the defense of the LAW ENTITY requesting it.

### COMMENTS

*This Plan is intended to provide a basic "floor" level of coverage for all Oregon attorneys engaged in the private practice of law whose principal offices are in Oregon. Because of this, there is a general prohibition against the stacking of either Limits of Coverage or CLAIMS EXPENSE ALLOWANCES. Except for the provision involving CLAIMS EXPENSE ALLOWANCES under Subsection 2, only one Limit of Coverage and CLAIMS EXPENSE ALLOWANCE will ever be paid under any one Plan issued to a COVERED PARTY in any one PLAN YEAR, regardless of the circumstances. Limits of Coverage or CLAIMS EXPENSE ALLOWANCES in multiple individual Plans do not stack for any CLAIMS that are "related." As the definition of SAME OR RELATED CLAIMS and its Comments and Examples demonstrate, the term "related" has a broad meaning when determining the number of Limits of Coverage and CLAIMS EXPENSE ALLOWANCES potentially available. This broad definition is designed to ensure the long-term economic viability of*

the PLF by protecting it from multiple limits exposures, ensuring fairness for all Oregon attorneys who are paying annual assessments, and keeping the overall coverage affordable.

~~The Plan grants a limited exception to the one-limit rule for SAME OR RELATED CLAIMS. When such CLAIMS are asserted against more than one separate LAW ENTITY, and one of the LAW ENTITIES is entitled to and requests a separate defense of the SUIT, then the Plan allows for a separate CLAIMS EXPENSE ALLOWANCE for that LAW ENTITY.~~

~~Anti-stacking provisions in the PLF Plan may create hardships for particular COVERED PARTIES who do not purchase excess coverage. Excess coverage provides coverage to -COVERED PARTIES who represent clients in situations in which single or multiple CLAIMS could result in exposure beyond one Limit of Coverage -should purchase excess professional liability coverage.~~

~~Effective January 1, 2005, the PLF has created a limited exception to the one limit rule for SAME OR RELATED CLAIMS. When such CLAIMS are asserted against more than one separate LAW ENTITY, and one of the LAW ENTITIES is entitled to and requests a separate defense of the SUIT, then the PLF will allow a separate CLAIMS EXPENSE ALLOWANCE for that LAW ENTITY.~~

The coverage provisions and limitations provided in this Plan are the absolute maximum amounts that can be recovered under the Plan. Therefore, no person or party is entitled to recover any consequential damages for breach of the Plan.

Example No. 1: Attorney A performed COVERED ACTIVITIES for a client while Attorney A was at two different law firms. Client sues A and both firms. Both firms request separate counsel, each one contending most of the alleged errors took place while A was at the other firm. The defendants are collectively entitled to a maximum of one \$300,000 Limit of Coverage and two CLAIMS EXPENSE ALLOWANCES. For purposes of this provision, Attorney A (or, if applicable, her professional corporation) is not a separate LAW ENTITY from the firm at which she worked. Accordingly, two, not three, CLAIMS EXPENSE ALLOWANCES are potentially available.

Example No. 2: Attorney A is a sole practitioner, practicing as an LLC, but also working of counsel for a partnership of B and C. While working of counsel, A undertook a case which he concluded involved special issues requiring the expertise of Attorney D, from another firm. D and C work together in representing the client and commit errors in handling the case. Two CLAIMS EXPENSE ALLOWANCES are potentially available. There are only two separate firms – the BC partnership and D’s firm.

---

## SECTION VII — NOTICE OF CLAIMS

1. The COVERED PARTY must, as a condition precedent to the right of protection afforded by this coverage, give the PLF, at the address shown in the Declarations, as soon as practicable, written notice of any CLAIM made against the COVERED PARTY. In the event a SUIT is brought against the COVERED PARTY, the COVERED PARTY must immediately notify and deliver to the PLF, at the address shown in the Declarations, every demand, notice, summons, or other process received by the COVERED PARTY or the COVERED PARTY'S representatives.

2. If the COVERED PARTY becomes aware of facts or circumstances that reasonably could be expected to be the basis of a CLAIM for which coverage may be provided under this Plan, the COVERED PARTY must give written notice to the PLF as soon as practicable during the COVERAGE

PERIOD of:

- a. The specific act, error, or omission;
- b. DAMAGES and any other injury that has resulted or may result; and
- c. The circumstances by which the COVERED PARTY first became aware of such act, error, or omission.

3. If the PLF opens a suspense or claim file involving a CLAIM or potential CLAIM which otherwise would require notice from the COVERED PARTY under subsection 1. or 2. above, the COVERED PARTY'S obligations under those subsections will be considered satisfied for that CLAIM or potential CLAIM.

#### COMMENTS

*This is a Claims Made Plan. Section IV.1.b determines when a CLAIM is first made for the purpose of triggering coverage under this Plan. Section VII states the COVERED PARTY'S obligation to provide the PLF with prompt notice of CLAIMS, SUITS, and potential CLAIMS.*

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### SECTION VIII — COVERAGE DETERMINATIONS

1. This Plan is governed by the laws of the State of Oregon, regardless of any conflict-of-law principle that would otherwise result in the laws of any other jurisdiction governing this Plan. Any disputes as to the applicability, interpretation, or enforceability of this Plan, or any other issue pertaining to the provision of benefits under this Plan, between any COVERED PARTY (or anyone claiming through a COVERED PARTY) and the PLF will be tried in the Multnomah County Circuit Court of the State of Oregon which will have exclusive jurisdiction and venue of such disputes at the trial level.

2. The PLF will not be obligated to provide any amounts in settlement, arbitration award, judgment, or indemnity until all applicable coverage issues have been finally determined by agreement or judgment.

3. In the event of exceptional circumstances in which the PLF, at the PLF's option, has paid a portion or all Limits of Coverage toward settlement of a CLAIM before all applicable coverage issues have been finally determined, then resolution of the coverage dispute as set forth in this Section will occur as soon as reasonably practicable following the PLF's payment. In the event it is determined that this Plan is not applicable to the CLAIM, or only partially applicable, then judgment will be entered in Multnomah County Circuit Court in the PLF's favor and against the COVERED PARTY (and all others on whose behalf the PLF's payment was made) in the amount of any payment the PLF made on an uncovered portion of the CLAIM, plus interest at the rate applicable to judgments from the date of the PLF's payment. Nothing in this Section creates an obligation by the PLF to pay a portion or all of the PLF's Limits of Coverage before all applicable coverage issues have been fully determined.

4. The bankruptcy or insolvency of a COVERED PARTY does not relieve the PLF of its obligations under this Plan.

#### COMMENTS

~~Historically, Section VIII provided for resolution of coverage disputes by arbitration. After 25~~

~~years of resolving disputes in this manner, the PLF concluded it would be more beneficial to YOU and the PLF to try these matters to a court where appeals are available and precedent can be established.~~

~~In the event of a dispute over coverage, Until the dispute over coverage is concluded, the PLF is not obligated to pay any amounts in dispute until the coverage dispute is concluded.~~ The PLF recognizes there may occasionally be exceptional circumstances making a coverage determination impracticable prior to a payment by the PLF of a portion or all of the PLF's Limit of Coverage toward resolution of a CLAIM. For example, a claimant may make a settlement demand having a deadline for acceptance that would expire before coverage could be determined, or a court might determine on the facts before it that a binding determination on the relevant coverage issue should not be made while the CLAIM is pending. In some of these exceptional circumstances, the PLF may at its option pay a portion or all of the Limit of Coverage before the dispute concerning the question of whether this Plan is applicable to the CLAIM is decided. If the PLF pays a portion or all of the Limit of Coverage and the court subsequently determines that this Plan is not applicable to the CLAIM, then the COVERED PARTY or others on whose behalf the payment was made must reimburse the PLF, in order to prevent unjust enrichment and protect the solvency and financial integrity of the PLF. For a COVERED PARTY'S duties in this situation, see Section IX.3.

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## SECTION IX — ASSISTANCE, COOPERATION, AND DUTIES OF COVERED PARTY

1. As a condition of coverage under this Plan, the COVERED PARTY will, without charge to the PLF, cooperate with the PLF and will:

- a. Provide to the PLF, within 30 days after written request, sworn statements providing full disclosure concerning any CLAIM or any aspect thereof;
- b. Attend and testify when requested by the PLF;
- c. Furnish to the PLF, within 30 days after written request, all files, records, papers, and documents that may relate to any CLAIM against the COVERED PARTY;
- d. Execute authorizations, documents, papers, loan receipts, releases, or waivers when so requested by the PLF;
- e. Submit to arbitration of any CLAIM when requested by the PLF;
- f. Permit the PLF to cooperate and coordinate with any excess or umbrella insurance carrier as to the investigation, defense, and settlement of all CLAIMS;
- g. Not communicate with any person other than the PLF or an insurer for the COVERED PARTY regarding any CLAIM that has been made against the COVERED PARTY, after notice to the COVERED PARTY of such CLAIM, without the PLF's written consent;
- h. Assist, cooperate, and communicate with the PLF in any other way necessary to investigate, defend, repair, settle, or otherwise resolve any CLAIM against the COVERED PARTY.

2. To the extent the PLF makes any payment under this Plan, it will be subrogated to any

COVERED PARTY's rights against third parties to recover all or part of these sums. When requested, every COVERED PARTY must assist the PLF in bringing any subrogation or similar claim. The PLF's subrogation or similar rights will not be asserted against any non-attorney employee of YOURS or YOUR law firm except for CLAIMS arising from intentional, dishonest, fraudulent, or malicious conduct of such person.

3. The COVERED PARTY may not, except at his or her own cost, voluntarily make any payment, assume any obligation, or incur any expense with respect to a CLAIM.

4. In the event the PLF proposes in writing a settlement to be funded by the PLF but subject to the COVERED PARTY's being obligated to reimburse the PLF if it is later determined that the Plan did not cover all or part of the CLAIM settled, the COVERED PARTY must advise the PLF in writing that the COVERED PARTY:

- a. Agrees to the PLF's proposal, or
- b. Objects to the PLF's proposal.

The written response must be made by the COVERED PARTY as soon as practicable and, in any event, must be received by the PLF no later than one business day (and at least 24 hours) before the expiration of any time-limited demand for settlement. A failure to respond, or a response that fails to unequivocally object to the PLF's written proposal, constitutes an agreement to the PLF's proposal. A response objecting to the settlement relieves the PLF of any duty to settle that might otherwise exist.

#### COMMENTS

*Subsection 4 addresses a problem that arises only when the determination of coverage prior to trial or settlement of the underlying claim is impracticable either because litigation of the coverage issue is not possible, permissible, or advisable, or because a pending trial date or time limit demand presents too short a period for resolution of the coverage issue prior to settlement or trial. In these circumstances, to avoid any argument that the PLF is acting as a volunteer, the PLF needs specific advice from the COVERED PARTY (or anyone claiming through the COVERED PARTY) either unequivocally agreeing that the PLF may proceed with the proposed settlement (i.e., waiving the volunteer argument) or unequivocally objecting to the proposed settlement (i.e., waiving any right to contend that the PLF has a duty to settle). ~~While the PLF recognizes the requirement of an unequivocal response in some circumstances forces the COVERED PARTY (or anyone claiming through the COVERED PARTY) to make a difficult judgment,~~ The exigencies of the situation require an unequivocal response so the PLF will know whether it can proceed with settlement without forfeiting its right to reimbursement to the extent the CLAIM is not covered.*

~~*The obligations of the Covered Party under Section IX as well as the other Sections of the Plan are to be performed without charge to the PLF.*~~

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#### SECTION X — ACTIONS BETWEEN THE PLF AND COVERED PARTIES

1. No legal action in connection with this Plan will be brought against the PLF unless the COVERED PARTY has fully complied with all terms of this Plan.

2. The PLF may bring legal action in connection with this Plan against a COVERED PARTY if:



- a. The PLF pays a CLAIM under another Plan issued by the PLF;
- b. A COVERED PARTY under this Plan is alleged to be liable for all or part of the damages paid by the PLF;
- c. As between the COVERED PARTY under this Plan and the person or entity on whose behalf the PLF has paid the CLAIM, the latter has an alleged right to pursue the COVERED PARTY under this Plan for contribution, indemnity, or otherwise, for all or part of the damages paid; and
- d. Such right can be alleged under a theory or theories for which no coverage is provided to the COVERED PARTY under this Plan.

3. In the circumstances outlined in Subsection 2, the PLF reserves the right to sue the COVERED PARTY, either in the PLF's name or in the name of the person or entity on whose behalf the PLF has paid, to recover such amounts as the PLF determines appropriate, up to the full amount the PLF has paid under one or more other Plans issued by the PLF. However, this Subsection will not entitle the PLF to sue the COVERED PARTY if the PLF's alleged rights against the COVERED PARTY are premised on a theory of recovery that would entitle the COVERED PARTY to indemnity under this Plan if the PLF's action were successful.

#### COMMENTS

*Under certain circumstances, a CLAIM against YOU may not be covered because of an exclusion or other applicable provision of the Plan issued to YOU. However, in some cases the PLF may be required to pay the CLAIM nonetheless because of the PLF's obligation to another COVERED PARTY under the terms of his or her Plan. This might occur, for example, when YOU are the attorney responsible for a CLAIM and YOU have no coverage due to YOUR intentional or wrongful conduct, but YOUR partner did not engage in or know of YOUR wrongful conduct but is nevertheless allegedly liable.*

*In these circumstances, if the PLF pays some or all of the CLAIM arising from YOUR conduct ~~it is fair that~~ the PLF ~~has the right to~~ may seek recovery back from YOU; otherwise, the PLF would effectively be covering YOUR non-covered CLAIMS simply because other COVERED PARTIES were vicariously liable.*

*Example No. 1: Attorney A misappropriates trust account funds belonging to Client X. Attorney A's partner, Attorney B, does not know of or acquiesce in Attorney A's wrongful conduct. Client X sues both Attorneys A and B. Attorney A has no coverage for the CLAIM under his Plan, but Attorney B has coverage for her liability under her Plan. The PLF pays the CLAIM under Attorney B's Plan. Section X.2 of Attorney A's Plan makes clear the PLF has the right to sue Attorney A for the damages the PLF paid under Attorney B's Plan.*

*Example No. 2: Same facts as the prior example, except that the PLF loans funds to Attorney B under terms that obligate Attorney B to repay the loan to the extent she recovers damages from Attorney A in an action for indemnity. Section X.2 of Attorney A's Plan makes clear that the PLF has the right pursuant to such arrangement with Attorney B to participate in her action against Attorney A.*

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#### SECTION XI — SUPPLEMENTAL ASSESSMENTS

This Claims Made Plan is assessable. Each PLAN YEAR is accounted for and assessable using

reasonable accounting standards and methods of assessment. If the PLF determines that a supplemental assessment is necessary to pay for CLAIMS, CLAIMS EXPENSE, or other expenses arising from or incurred during either this PLAN YEAR or a previous PLAN YEAR, YOU agree to pay YOUR supplemental assessment to the PLF within 30 days of request.

The PLF is authorized to make additional assessments against YOU for this PLAN YEAR until all the PLF's liability for this PLAN YEAR is terminated, whether or not YOU are a COVERED PARTY under a Plan issued by the PLF at the time the assessment is imposed.

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## **SECTION XII — RELATION OF PLF COVERAGE TO INSURANCE COVERAGE OR OTHER COVERAGE**

If the COVERED PARTY has valid and collectible insurance coverage or other obligation to indemnify that also applies to any loss or CLAIM covered by this Plan, the PLF will not be liable under the Plan until the limits of the COVERED PARTY'S insurance or other obligation to indemnify, including any applicable deductible, have been exhausted, unless such insurance or other obligation to indemnify is written only as specific excess coverage over the CLAIMS EXPENSE ALLOWANCE and Limits of Coverage of this Plan.

### *COMMENTS*

*As explained in the Preface, ~~this Plan is not an insurance policy. To the extent that insurance or other coverage exists, this Plan may not be invoked. This provision is designed to preclude the application of the other insurance law rules applicable under Lamb-Weston v. Oregon Automobile Ins. Co. 219 Or 110, 341 P2d 110, 346 P2d 643 (1959).~~*

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## **SECTION XIII — WAIVER AND ESTOPPEL**

Notice to or knowledge of the PLF's representative, agent, employee, or any other person will not effect a waiver, constitute an estoppel, or be the basis of any change in any part of this Plan nor will the terms of this Plan be waived or changed except by written endorsement issued and signed by the PLF's authorized representative.

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## **SECTION XIV — AUTOMATIC EXTENDED CLAIMS REPORTING PERIOD**

- 1.** If YOU:
  - a.** Terminate YOUR PLF coverage during the PLAN YEAR, or
  - b.** Do not obtain PLF coverage as of the first day of the next PLAN YEAR,

YOU will automatically be granted an extended reporting period for this Plan at no additional cost. The extended reporting period will commence on the day after YOUR last day of PLF coverage and will continue until the expiration of the time allowed for any CLAIM to be made against YOU or any other COVERED PARTY listed in SECTION II of this Plan, or the date specified in Subsection 2, whichever date is earlier. Any extension granted under this Subsection will not increase the CLAIMS EXPENSE

ALLOWANCE or the Limits of Coverage available under this Plan, nor provide coverage for YOUR activities which occur after YOUR last day of PLF coverage.

2. If YOU terminate YOUR PLF coverage during this PLAN YEAR and return to PLF coverage later in this same PLAN YEAR:

- a. The extended reporting period granted to YOU under Subsection 1 will automatically terminate as of the date YOU return to PLF coverage;
- b. The coverage provided under this Plan will be reactivated; and
- c. YOU will not receive a new Limit of Coverage or CLAIMS EXPENSE ALLOWANCE on YOUR return to coverage.

#### COMMENTS

~~Subsection 1 sets forth YOUR right to extend the reporting period in which a CLAIM must be made. The granting of YOUR rights hereunder an extended reporting period does not establish a new or increased CLAIMS EXPENSE ALLOWANCE or Limits of Coverage, but instead merely extends the reporting period under this Plan which will apply to all covered CLAIMS made against YOU during the extended reporting period. The terms and conditions of this Plan will continue to apply to all CLAIMS that may be made against YOU during the extended reporting period. This extended CLAIMS reporting period is subject to other limitations and requirements, which are available from the PLF on request.~~

Attorneys with PLF coverage who leave the private practice of law in Oregon during the PLAN YEAR are permitted to terminate their coverage mid-year and seek a prorated refund of their annual assessment under PLF Policy 3.400. Attorneys who do so will receive extended reporting coverage under this section effective as of the day following their last day of PLF coverage. For attorneys who engage in the private practice of law in Oregon through the end of the current PLAN YEAR but do not obtain PLF coverage at the start of the next PLAN YEAR, their extended reporting coverage begins on the first day after the current PLAN YEAR.

*Example No. 1: Attorney A obtains regular PLF coverage in 2010 with a CLAIMS EXPENSE ALLOWANCE of \$50,000 and Limits of Coverage of \$300,000. One CLAIM is asserted in 2010 for which a total of \$200,000 is paid in indemnity and expense (including the entire \$50,000 CLAIMS EXPENSE ALLOWANCE). The remaining Limits of Coverage under the 2010 Plan are \$150,000. Attorney A leaves the private practice of law on December 31, 2010 and obtains extended reporting coverage at no charge. The 2010 Plan will apply to all CLAIMS made in 2011 or later years, and only \$150,000 in Limits of Coverage (the balance left under Attorney A's 2010 Plan) is-are available for all CLAIMS made in 2011 or later years. There is no remaining CLAIMS EXPENSE ALLOWANCE for any new CLAIMS.*

*Example No. 2: Attorney B obtains regular PLF coverage in 2010, but leaves private practice on March 31, 2010 and obtains a prorated refund of her 2010 assessment. Attorney B will automatically obtain extended reporting coverage under her 2010 Plan as of April 1, 2010. Attorney B returns to PLF coverage on October 1, 2010. Her extended reporting coverage terminates as of that date, and she will not receive new Limits of Coverage or CLAIMS EXPENSE ALLOWANCE. If a CLAIM is made against her in November 2010, her 2010 Plan will cover the CLAIM whether it arises from an alleged error occurring before April 1, 2010 or on or after October 1, 2010.*

## **SECTION XV — ASSIGNMENT**

The interest hereunder of any COVERED PARTY is not assignable.

~~EXHIBIT A — FORM ORPC 1~~

~~Dear [—Client—]:~~

~~This letter confirms that we have discussed [specify the essential terms of the business transaction that you intend to enter into with your client and your role in the transaction. Be sure to inform the client whether you will be representing the client in the transaction. This is required by ORPC 1.8(a)(3)]. This letter also sets forth the conflict of interest that arises for me as your attorney because of this proposed business transaction.~~

~~The Oregon Rules of Professional Conduct prohibit an attorney from representing a client when the attorney's personal interests conflict with those of the client unless the client consents. Consequently, I can only act as your lawyer in this matter if you consent after being adequately informed. Rule 1.0(g) provides as follows:~~

~~—(g) “Informed consent” denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct. When informed consent is required by these Rules to be confirmed in writing or to be given in a writing signed by the client, the lawyer shall give and the writing shall reflect a recommendation that the client seek independent legal advice to determine if consent should be given.~~

~~Although our interests presently appear to be consistent, my interests in this transaction could at some point be different than or adverse to yours. Specifically, [include an explanation which is sufficient to apprise the client of the potential adverse impact on the client of the matter to which the client is asked to consent, and any reasonable alternative courses of action, if applicable].~~

~~Please consider this situation carefully and decide whether or not you wish to enter into this transaction with me and to consent to my representation of you in this transaction. Rule 1.8(a)(2) requires me to recommend that you consult with another attorney in deciding whether or not your consent should be given. Another attorney could also identify and advise you further on other potential conflicts in our interests.~~

~~I enclose an article “Business Deals Can Cause Problems,” which contains additional information. If you do decide to consent, please sign and date the enclosed extra copy of this letter in the space provided below and return it to me.~~

~~Very truly yours,~~

~~[Attorney Name and Signature]~~

~~I hereby consent to the legal representation, the terms of the business transaction, and the lawyer's role in transaction as set forth in this letter:~~

~~\_\_\_\_\_~~  
~~\_\_\_\_\_~~  
~~\_\_\_\_\_ [Client's Signature] \_\_\_\_\_ [Date]~~

~~Enclosure: \_\_\_\_\_ “Business Deals Can Cause Problems,” by Jeffrey D. Sapiro.~~

~~**BUSINESS DEALS CAN CAUSE PROBLEMS (Complying With ORPC 1.8(a))**~~

~~By Jeffrey D. Sapiro, Disciplinary Counsel, Oregon State Bar~~

~~Something that clients often lose sight of is that attorneys are not only legal advisors, but are business people as well. It is no secret that most practitioners wish to build a successful practice, rendering quality legal services to their clients, as a means of providing a comfortable living for themselves and/or their families. Given this objective, it is not surprising that many attorneys are attracted to business opportunities outside their practices that may prove to be financially rewarding. The fact that these business opportunities are often brought to an attorney's attention by a client or through involvement in a client's financial affairs is reason to explore the ethical problems that may arise.~~

~~ORPC 1.8(a) and 1.0(g) read as follows:~~

~~*Rule 1.8 Conflict of Interest: Current Clients: Specific Rules*~~

~~(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:~~

~~(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;~~

~~(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and~~

~~(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.~~

~~*ORPC 1.0 Terminology*~~

~~(g) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct. When informed consent is required by these Rules to be confirmed in writing or to be given in a writing signed by the client, the lawyer shall give and the writing shall reflect a recommendation that the client seek independent legal advice to determine if consent should be given.~~

~~The rationale behind this rule should be obvious. An attorney has a duty to exercise professional judgment solely for the benefit of a client, independent of any conflicting influences or loyalties. If an attorney is motivated by financial interests adverse to that of the client, the undivided loyalty due to the client may very well be compromised. (See also ORPC 1.7 and 1.8(c) and (i)) Full disclosure in writing gives the client the opportunity and necessary information to obtain independent legal advice when the~~

~~attorney's judgment may be affected by personal interest. Under ORPC 1.8(a) it is the client and not the attorney who should decide upon the seriousness of the potential conflict and whether or not to seek separate counsel.~~

~~A particularly dangerous situation is where the attorney not only engages in the business aspect of a transaction, but also furnishes the legal services necessary to put the deal together. In *In re Brown*, 277 Or 121, 559 P2d 884, rev. den. 277 Or 731, 561 P2d 1030 (1977), an attorney became partners with a friend of many years in a timber business, the attorney providing legal services and the friend providing the capital. The business later incorporated, with the attorney drafting all corporate documents, including a buy-sell agreement permitting the surviving stockholder to purchase the other party's stock. The Oregon Supreme Court found that the interests of the parties were adverse for a number of reasons, including the disparity in capital invested and the difference in the parties' ages, resulting in a potential benefit to the younger attorney under the buy-sell provisions. Despite the fact that the friend was an experienced businessman, the court held that the attorney violated the predecessor to ORPC 1.8(a), DR 5-104(A), because the friend was never advised to seek independent legal advice.~~

~~Subsequent to *Brown*, the Supreme Court has disciplined several lawyers for improper business transactions with clients. Among these cases are *In re Drake*, 292 Or 704, 642 P2d 296 (1982), which provides a comprehensive analysis of ORPC 1.8(a)'s predecessor, DR 5-104(A); *In re Montgomery*, 292 Or 796, 643 P2d 338 (1982), in which the fact that the client was a more sophisticated business person than the attorney did not affect the court's analysis; *In re Germundson*, 201 Or 656, 724 P2d 793 (1986), in which a close friendship between the attorney and the client was deemed insufficient reason to dispense with conflict disclosures; and *In re Griffith*, 304 Or 575, 748 P2d (1987), in which the court noted that, even if no conflict is present when a transaction is entered into, subsequent events may lead to a conflict requiring disclosures or withdrawal by the attorney.~~

~~Even in those situations where the attorney does not furnish legal services, problems may develop. There is a danger that, while the attorney may feel he or she is merely an investor in a business deal, the client may believe the attorney is using his or her legal skills to protect the client's interests in the venture. Indeed, this may be the very reason the client approached the attorney with a business proposition in the first place. When a lawyer borrows money from a client, there may even be a presumption that the client is relying on the lawyer for legal advice in the transaction. *In re Montgomery*, 292 Or 796, 643 P2d 338 (1982). To clarify for the client the role played by the attorney in a business transaction, ORPC 1.8(a)(3) now provides that a client's consent to the attorney's participation in the transaction is not effective unless the client signs a writing that describes, among other things, the attorney's role and whether the attorney is representing the client in the transaction.~~

~~In order to avoid the ethical problems addressed by the conflict-of-interest rules, the Supreme Court has said that an attorney must at least advise the client to seek independent legal counsel (*In re Bartlett*, 283 Or 487, 584 P2d 296 (1978)). This is now required by ORPC 1.8(a)(2). The attorney should disclose not only that a conflict of interest may exist, but should also explain the nature of the conflict "in such detail so that (the client) can understand the reasons why it may be desirable for each to have independent counsel. . ." (*In re Boivin*, 271 Or 419, 424, 533 P2d 171 (1975)). Risks incident to a transaction with a client must also be disclosed (ORPC 1.0(g); *In re Montgomery*, 297 Or 738, 687 P2d 157 (1984); *In re Whipple*, 296 Or 105, 673 P2d 172 (1983)). Such a disclosure will help ensure that there is no misunderstanding over the role the attorney is to play in the transaction and will help prevent the attorney from running afoul of the disciplinary rule discussed above.~~

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PLF Claims Made Excess Plan



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# OREGON STATE BAR PROFESSIONAL LIABILITY FUND

## CLAIMS MADE EXCESS PLAN

Effective January 1, 201~~6~~5

**THIS IS A CLAIMS MADE EXCESS PLAN – PLEASE READ CAREFULLY**

### NOTICE

**THIS EXCESS PLAN IS WRITTEN AS SPECIFIC EXCESS COVERAGE TO THE PLF CLAIMS MADE PLAN AND CONTAINS PROVISIONS MORE RESTRICTIVE THAN THE COVERAGE AFFORDED BY THE PLF CLAIMS MADE PLAN. THIS EXCESS PLAN CONTAINS PROVISIONS THAT REDUCE THE LIMITS OF COVERAGE BY THE COSTS OF LEGAL DEFENSE. THIS EXCESS PLAN IS ASSESSABLE.**

Various provisions in this Excess Plan restrict coverage. Read the entire Excess Plan to determine rights, duties and what is and is not covered.

### INTERPRETATION OF THIS EXCESS PLAN

~~**Bracketed Titles.** The bracketed titles appearing throughout this Excess Plan are not part of the Excess Plan and should not be used as an aid in interpreting the Excess Plan. The bracketed titles are intended simply as a guide to aid the reader in locating pertinent provisions.~~

**Plan Comments.** In contrast, the discussions labeled "COMMENTS" following various provisions of this Excess Plan are intended as aids in interpretation. These interpretive provisions add background information and provide additional considerations to be used in the interpretation and construction of this Excess Plan.

**Use of Capitals.** Capitalized terms are defined in Section I of this Excess Plan and the PLF CLAIMS MADE PLAN. ~~The definition of COVERED PARTY appearing in Section II and the definition of COVERED ACTIVITY appearing in Section III are particularly crucial to the understanding of the coverage grant.~~

### COMMENTS

**History.** *Through the issuance of separate PLF PLANS to each individual attorney, the PLF provides primary malpractice coverage to all attorneys engaged in the private practice of law in Oregon. This Excess Plan was created pursuant to enabling legislation empowering the Board of Governors of the Oregon State Bar to establish an optional, underwritten program of excess malpractice coverage through the PLF for those attorneys and firms which want higher coverage limits. See ORS 9.080 (2) (a) and its legislative history. The PLF has been empowered to do whatever is necessary and convenient to achieve*

*this objective. See, e.g., Balderree v. Oregon State Bar, 301 Or 155, 719 P2d 1300 (1986). Pursuant to this authority, the PLF has adopted this Excess Plan.*

**Claims Made Form.** *This Excess Plan is a claims made coverage plan. This Excess Plan is a contractual agreement between the PLF and THE FIRM.*

**Interpretation of the Excess Plan.** *This Excess Plan is to be interpreted throughout in a manner consistent with the interpretation of the PLF CLAIMS MADE PLAN.*

Accordingly, Comments to language in the PLF PLAN apply to similar language in this Excess Plan.

~~**Purpose of Comments.**—These Comments are similar in form to the UCC and Restatements. They are intended to aid in the construction of the language of this Excess Plan. By the addition of these Comments, the PLF hopes to avoid the existence of any ambiguities, to assist attorneys in interpreting the coverage available to them, and to provide a specific basis for interpretation.~~

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## SECTION I – DEFINITIONS

**1.** Throughout this Excess Plan, the following terms, when appearing in capital letters, mean the same as their definitions in the PLF CLAIMS MADE PLAN:

- a. PLF
- b. SUIT
- c. CLAIM
- d. SAME OR RELATED CLAIMS
- e. DAMAGES
- f. BUSINESS TRUSTEE
- g. CLAIMS EXPENSE
- h. COVERAGE PERIOD
- i. INVESTMENT ADVICE
- j. LAW ENTITY

**2.** Throughout this Excess Plan, when appearing in capital letters:

**a.** The words “THE FIRM” refer to the law entities designated in Sections 1 and 11 of the Declarations.

**b.** “COVERED PARTY” means any person or organization qualifying as such under Section II – WHO IS A COVERED PARTY.

**c.** “COVERED ACTIVITY” means conduct qualifying as such under Section III -- WHAT IS A COVERED ACTIVITY.

**d.** “PLAN YEAR” means the period January 1 through December 31 of the calendar year for which this Excess Plan was issued.

**e.** The words “PLF CLAIMS MADE PLAN” or “PLF PLAN” refer to the PLF Claims Made Plan issued by the PLF as primary coverage for the PLAN YEAR.

**f.** The words "APPLICABLE UNDERLYING LIMIT" mean the aggregate total of (1) the amount of the coverage afforded by the applicable PLF PLANS issued to all persons qualifying as COVERED PARTIES under the terms of this Excess Plan, plus (2) the amount of any other coverage available to any COVERED PARTY with respect to the CLAIM for which coverage is sought.

**g.** "FIRM ATTORNEY" means an attorney listed in Section 10 of the Declarations.

**h.** "FORMER ATTORNEY" means an attorney listed in Section 12 of the Declarations.

**i.** "NON-OREGON ATTORNEY" means an attorney listed in Section 14 or 15 of the Declarations.

**j.** "EXCLUDED ATTORNEY" means an attorney listed in Section 16 of the Declarations.

**k.** "EXCLUDED FIRM" means a LAW ENTITY listed in Section 17 of the Declarations.

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## SECTION II – WHO IS A COVERED PARTY

The following are COVERED PARTIES:

**1.** THE FIRM, except that THE FIRM is not a COVERED PARTY with respect to liability arising out of conduct of an attorney who was affiliated in any way with THE FIRM at any time during the five years prior to the beginning of the COVERAGE PERIOD but is not listed as a FIRM ATTORNEY, FORMER ATTORNEY, or NON-OREGON ATTORNEY in the Declarations.

**2.** Any person listed as a FIRM ATTORNEY, FORMER ATTORNEY, or NON-OREGON ATTORNEY in the Declarations, but only with respect to CLAIMS which arise out of a COVERED ACTIVITY rendered on behalf of THE FIRM.

**3.** Any former partner, shareholder, member, or attorney employee of THE FIRM, or any person formerly in an "of counsel" relationship to THE FIRM, who ceased to be affiliated in any way with THE FIRM more than five years prior to the beginning of the COVERAGE PERIOD, but only with respect to CLAIMS which arise out of a COVERED ACTIVITY rendered on behalf of THE FIRM and only for COVERED ACTIVITIES that took place while a PLF CLAIMS MADE PLAN issued to that person was in effect.

**4.** In the event of death, adjudicated incapacity, or bankruptcy, the conservator, guardian, trustee in bankruptcy, or legal or personal representative of any COVERED PARTY listed in Subsections 1 to 3 but only to the extent that such COVERED PARTY would otherwise be provided coverage under this Excess Plan.

**5.** Any attorney who becomes affiliated with THE FIRM after the beginning of the COVERAGE PERIOD who has been issued a PLF PLAN by the PLF, but only with respect to CLAIMS which arise out of a COVERED ACTIVITY rendered on behalf of THE FIRM. However, newly affiliated attorneys are not automatically COVERED PARTIES under this Subsection if: (a) the number of FIRM ATTORNEYS increases by more than 100 percent; (b) there is a firm merger or split; (c) an attorney joins or leaves a branch office of THE FIRM outside Oregon; (d) a new branch office is established outside Oregon; (e) THE FIRM or a current attorney with THE FIRM enters into an "of counsel" relationship with another firm or with an attorney who was not listed as a current attorney at the start of the COVERAGE PERIOD; or (f) THE FIRM hires an attorney who is not eligible to participate in the PLF's CLAIMS MADE PLAN.

*COMMENTS*

*Firms are generally not required to notify the PLF if an attorney joins or leaves THE FIRM after the start of the COVERAGE PERIOD, and are neither charged a prorated excess assessment nor receive a prorated refund for such changes. New attorneys who join after the start of the COVERAGE PERIOD are covered for their actions on behalf of THE FIRM during the remainder of the year. All changes after the start of the COVERAGE PERIOD should be reported to the PLF in THE FIRM'S renewal application for the next year.*

*Firms are required to notify the PLF after the start of the COVERAGE PERIOD, however, if any of the six circumstances listed in Subsection 5 apply. Under these circumstances, THE FIRM'S coverage will be subject again to underwriting, and a prorated adjustment may be made to THE FIRM'S excess assessment.*

*Please note also that FIRM ATTORNEYS, FORMER ATTORNEYS, and NON-OREGON ATTORNEYS have coverage under this Excess Plan only for CLAIMS which arise out of work performed for THE FIRM. For example, there is no coverage for CLAIMS which arise out of work performed for another firm before an attorney began working for THE FIRM; the attorney will have coverage, if at all, only under any Excess Plan or policy maintained by the other firm.*

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## SECTION III – WHAT IS A COVERED ACTIVITY

The following are COVERED ACTIVITIES:

### ~~{COVERED PARTY'S CONDUCT}~~

1. **Covered Party's Conduct.** Any act, error, or omission by an attorney COVERED PARTY in the performance of professional services in the COVERED PARTY'S capacity as an attorney in private practice, as long as the act, error, or omission was rendered on behalf of THE FIRM and occurred after any applicable Retroactive Date and before any applicable Separation Date specified in the Declarations.

### ~~{CONDUCT OF OTHERS}~~

2. **Conduct of Others.** Any act, error, or omission by a person, other than an EXCLUDED ATTORNEY, for whose conduct an attorney COVERED PARTY is legally liable in the COVERED PARTY'S capacity as an attorney for THE FIRM provided each of the following criteria is satisfied:

a. The act, error, or omission causing the attorney COVERED PARTY'S liability occurred after any applicable Retroactive Date and before any applicable Separation Date specified in the Declarations;

b. The act, error, or omission, if committed by the attorney COVERED PARTY, would constitute the providing of professional services in the attorney COVERED PARTY'S capacity as an attorney in private practice; and

c. The act, error, or omission was not committed by an attorney who either (1) was affiliated in any way with THE FIRM during the five years prior to the COVERAGE PERIOD but was not listed as a FIRM ATTORNEY, FORMER ATTORNEY, or NON-OREGON ATTORNEY in the Declarations; or (2) ceased to be affiliated with THE FIRM more than five years prior to the beginning of the COVERAGE PERIOD but was not covered by a PLF CLAIMS MADE PLAN at the time of the act, error, or omission.

~~[COVERED PARTY'S CONDUCT IN A SPECIAL CAPACITY]~~

**3. Covered Party's Conduct in a Special Capacity.** Any act, error, or omission by an attorney COVERED PARTY in his or her capacity as a personal representative, administrator, conservator, executor, guardian, special representative pursuant to ORS 128.179 or similar statute, or trustee (except BUSINESS TRUSTEE); provided that the act, error, or omission arose out of a COVERED ACTIVITY as defined in Subsections 1 and 2 above; the CLAIM is brought by or for the benefit of a beneficiary of the special capacity relationship and arises out of a breach of that relationship; and such activity occurred after any applicable Retroactive Date and before any applicable Separation Date specified in the Declarations.

COMMENTS

*To qualify for coverage a claim must arise out of a COVERED ACTIVITY. The definition of COVERED ACTIVITY imposes a number of restrictions on coverage. For additional Comments and examples discussing this requirement, see the Comments to Section III in the PLF CLAIMS MADE PLAN.*

**Retroactive Date.** *This Section introduces the concept of a Retroactive Date. If a Retroactive Date applies to a CLAIM to place it outside the definition of a COVERED ACTIVITY, there will be no coverage for the CLAIM under this Excess Plan as to any COVERED PARTY, even for vicarious liability.*

**Example:** *Attorneys A and B practice as partners and apply for excess coverage from the PLF for Year 1. A has had several recent large claims arising from an inadequate docket control system, but implemented an adequate system on July 1 of the previous year. For underwriting reasons, the PLF decides to offer coverage to the firm under this Excess Plan with a Retroactive Date of July 1 of the previous year. A CLAIM is made against Attorney A, Attorney B, and the firm during Year 1 arising from conduct of Attorney A occurring prior to July 1 of the previous year. Because the conduct in question occurred prior to the firm's Retroactive Date under this Excess Plan, the CLAIM does not fall within the definition of a COVERED ACTIVITY and there is no coverage for the CLAIM for Attorney A, B, or the firm.*

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## SECTION IV – GRANT OF COVERAGE

### 1. Indemnity.

**a.** The PLF will pay those sums in excess of any APPLICABLE UNDERLYING LIMITS or applicable Deductible that a COVERED PARTY becomes legally obligated to pay as DAMAGES because of CLAIMS arising out of a COVERED ACTIVITY to which this Excess Plan applies. No other obligation or liability to pay sums or perform acts or services is covered unless specifically provided for under Subsection 2 – Defense.

**b.** This Excess Plan applies only to CLAIMS first made against a COVERED PARTY during the COVERAGE PERIOD, except as provided in this Subsection. A CLAIM will be deemed to have been first made at the time it would be deemed first made under the terms of the PLF PLAN. Two or more CLAIMS that are SAME OR RELATED CLAIMS, whenever made, will all be deemed to have been first made at the time they are deemed first made under the terms of the applicable PLF PLAN; provided, however, that a CLAIM that is asserted against a COVERED PARTY during the COVERAGE PERIOD will not relate back to a previous SAME OR RELATED CLAIM if prior to the COVERAGE PERIOD (1) none of the SAME OR

RELATED CLAIMS were made against any COVERED PARTY in this Excess Plan and (2) no COVERED PARTY had knowledge of any facts reasonably indicating that any CLAIM could or would be made in the future against any COVERED PARTY.

c. This Excess Plan applies only if the COVERED ACTIVITY giving rise to the CLAIM happens:

(1) During the COVERAGE PERIOD, or

(2) Prior to the COVERAGE PERIOD, provided that both of the following conditions are met:

(a) Prior to the effective date of this Excess Plan no COVERED PARTY had a basis to believe that the act, error, or omission was a breach of professional duty or may result in a CLAIM; and

(b) There is no prior policy or policies or agreements to indemnify ~~which~~ which provide coverage for such liability or CLAIM, whether or not the available limits of liability of such prior policy or policies or agreements to indemnify are sufficient to pay any liability or CLAIM or whether or not the underlying limits and amount of such policy or policies or agreements to indemnify are different from this Excess Plan.

Subsection c(2)(a) of this Section will not apply as to any COVERED PARTY who, prior to the effective date of this Excess Plan, did not have a basis to believe that the act, error, or omission was a breach of professional duty or may result in a CLAIM, but only if THE FIRM circulated its Application for coverage among all FIRM ATTORNEYS listed in Section 10 of the Declarations and Current NON-OREGON ATTORNEYS listed in Section 14 of the Declarations before THE FIRM submitted it to the PLF.

d. This Excess Plan applies only to SUITS brought in the United States, its territories or possessions, Canada, or the jurisdiction of any Indian Tribe within the United States. This Excess Plan does not apply to SUITS brought in any other jurisdiction, or to SUITS brought to enforce a judgment rendered in any jurisdiction other than the United States, its territories or possessions, Canada, or the jurisdiction of any Indian Tribe within the United States.

e. The amount the PLF will pay is limited as described in SECTION VI.

f. Coverage under this Excess Plan is conditioned upon full and timely payment of all assessments.

#### COMMENTS

**Claims Made Form.** *This is a claims made Excess Plan. It applies to CLAIMS first made during the COVERAGE PERIOD shown in the Declarations. CLAIMS first made either prior to or subsequent to the COVERAGE PERIOD are not covered by this Excess Plan.*

**When Claim First Made; Multiple Claims.** *Except as specifically provided, this Excess Plan does not cover CLAIMS made prior to the COVERAGE PERIOD. The Excess Plan is intended to follow the terms of the PLF CLAIMS MADE PLAN with respect to when a CLAIM is first made and with respect to the treatment of multiple CLAIMS. See Section I.8, IV.1(b)(2), and VI.2, and related Comments and Examples in the PLF PLAN. However, because of the exception in Subsection 1.b. in this Excess Plan, CLAIMS made during the COVERAGE PERIOD will not relate back to previously made CLAIMS that were made against other attorneys or firms, as long as THE FIRM did not reasonably know that a CLAIM would be made under this Excess Plan.*

Example: Firm G does not maintain excess coverage. Firm G and one of its members, Attorney A, are sued by Claimant in Year 1. The claim is covered under Attorney A's Year 1 primary PLF PLAN. Claimant amends the complaint in Year 2, and for the first time asserts the same claim also against Firm H and one of its members, Attorney B. Neither Firm H nor Attorney B had previously been aware of the potential claim, and no notice of a potential claim against Attorney B or Firm H had previously been given to the PLF or any other carrier. Firm H carried its Year 1 excess coverage with Carrier X and carries its Year 2 excess coverage with the PLF. Carrier X denies coverage for the claim because Firm H did not give notice of the claim to Carrier X in Year 1 and did not purchase tail coverage from Carrier X. Under the terms of Subsection b.1, in these limited circumstances, Firm H's Year 2 Excess Plan would become excess to the Year 1 PLF CLAIMS MADE PLAN issued by the PLF as primary coverage to Attorney B.

**Covered Activity During Coverage Period.** To the extent that any COVERED PARTY under this Excess Plan has knowledge prior to the COVERAGE PERIOD that particular acts, errors, or omissions have given rise or could give rise to a CLAIM, ~~it is reasonable that~~ that CLAIM and other CLAIMS arising out of such acts, errors, or omissions would not be covered under this Excess Plan. Such CLAIMS should instead be covered under the policy or plan in force, if any, at the time the first such CLAIM was made or notice of a potential CLAIM could have been given under the terms of the prior policy or plan. Subsection (c) achieves these purposes by limiting the terms of the Coverage Grant with respect to acts, errors, or omissions which happen prior to the COVERAGE PERIOD so that no coverage is granted where there is prior knowledge, prior insurance or other coverage.

Example: Law firm maintains excess malpractice coverage with Carrier X in Year 1. The firm knows of a potential malpractice claim in September of that year, and could report it as a suspense matter or incident report to Carrier X at that time and obtain coverage under the firm's excess policy. The firm does not report the potential claim to Carrier X in Year 1. The firm obtains excess coverage from the PLF in Year 2, and the potential claim is actually asserted in April of Year 2. Whether or not the PLF has imposed a Retroactive Date for the firm's Year 2 coverage, there is no coverage for the claim under the firm's Year 2 Excess Plan with the PLF. This is true whether or not Carrier X provides coverage for the claim.

Example: Attorneys A, B, and C practice in a partnership. In Year 1, Attorney C knows of a potential claim arising from his activities, but does not tell the PLF or Attorneys A or B. Attorney A completes a Year 2 PLF excess program application on behalf of the firm, but does not reveal the potential claim because it is unknown to her. Attorney A does not circulate the application to attorneys B and C before submitting it to the PLF. The PLF issues an Excess Plan to the firm for Year 2, and the potential claim known to Attorney C in Year 1 is actually made against Attorneys A, B, and C and the firm in June of Year 2. Because the potential claim was known to a Covered Party (i.e., Attorney C) prior to the beginning of the Coverage Period, and because the firm did not circulate its application among the FIRM ATTORNEYS and Current NON-OREGON ATTORNEYS before submitting it to the PLF, the claim is not within the Coverage Grant. There is no coverage under the Year 2 Excess Plan for Attorneys A, B, or C or for the firm even though Attorneys A and B did not know of the potential claim in Year 1.

Example: Same facts as prior example, except that Attorney A did circulate the application to Attorneys B and C before submitting it to the PLF. Subsection c(2) will not be applied to deny coverage for the CLAIM as to Attorneys A and B and THE FIRM.



*However, there will be no coverage for Attorney C because the CLAIM falls outside the coverage grant under the terms of Subsection c(2)(b) and because Attorney C made a material misrepresentation to the PLF in the application.*

## **2. Defense**

**a.** After all APPLICABLE UNDERLYING LIMITS have been exhausted and the applicable Deductible has been expended, the PLF will defend any SUIT against a COVERED PARTY seeking DAMAGES to which this coverage applies until the Limits of Coverage extended by this Excess Plan are exhausted. The PLF has the sole right to investigate, repair, settle, designate defense attorneys, and otherwise conduct defense, repair, or prevention of any CLAIM or potential CLAIM.

**b.** With respect to any CLAIM or potential CLAIM the PLF defends or repairs, the PLF will pay all reasonable and necessary CLAIMS EXPENSES ~~incurred~~. ~~the PLF may incur~~. All payments will reduce the Limits of Coverage.

**c.** If the Limits of Coverage stated in the Declarations are exhausted prior to the conclusion of any CLAIM, the PLF ~~may~~ withdraw from further defense of the CLAIM.

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## **SECTION V – EXCLUSIONS FROM COVERAGE**

### *COMMENTS*

*Although many of the Exclusions in this Excess Plan are similar to the Exclusions in the PLF CLAIMS MADE PLAN, the Exclusions have been modified to apply to the Excess Plan and should be read carefully. For example, because the Excess Plan is issued to law firms rather than to individual attorneys, the Exclusions were modified to make clear which ones apply to all firm members and which apply only to certain firm members. Exclusions 22 (office sharing), 23 (excluded attorney), and 24 (excluded firm) are not contained in the PLF CLAIMS MADE PLAN.*

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### ~~{WRONGFUL CONDUCT EXCLUSIONS}~~

**1. Fraudulent Claim Exclusion.** This Excess Plan does not apply to any COVERED PARTY for any CLAIM in which that COVERED PARTY participates in a fraudulent or collusive CLAIM.

**2. Wrongful Conduct Exclusion.** This Excess Plan does not apply to the following CLAIMS, regardless of whether any actual or alleged harm or damages were intended:

(a) Any CLAIM against any COVERED PARTY arising out of or connected with any actual or alleged criminal act or conduct on the part of any COVERED PARTY;

(b) Any CLAIM against any COVERED PARTY based on any actual or alleged dishonest, knowingly wrongful, fraudulent or malicious act or conduct on the part of any COVERED PARTY;

(c) Any CLAIM against any COVERED PARTY based on any COVERED PARTY'S intentional violation of the Oregon Rules of Professional Conduct (ORCP) or any other applicable code of professional conduct; or

(d) Any CLAIM based on or arising out of the non-payment of a valid and enforceable lien if actual notice of such lien was provided to any COVERED PARTY, or anyone employed by the FIRM, prior to the payment of funds to any person or entity other than the rightful lienholder.

Subsections (a), (b) and (c) of this exclusion do not apply to any COVERED PARTY who: (i) did not personally commit, direct or participate in any of the acts or conduct excluded by these provisions; and (ii) either had no knowledge of any such acts or conduct, or who after becoming aware of any such acts or conduct, did not acquiesce or remain passive regarding any such acts or conduct and, upon becoming aware of any such acts or conduct, immediately notified the PLF.

~~This Excess Plan does not apply to any COVERED PARTY for any CLAIM based upon or arising out of any intentional, dishonest, fraudulent, criminal, malicious, knowingly wrongful, or knowingly unethical acts, errors, or omissions committed by that COVERED PARTY or at the direction of that COVERED PARTY, or in which that COVERED PARTY acquiesces or remains passive after having personal knowledge thereof.~~

**3. Disciplinary Proceedings Exclusion.** This Excess Plan does not apply to any CLAIM based upon or arising out of a proceeding brought by the Oregon State Bar or any similar entity.

**4. Punitive Damages and Cost Award Exclusions.** This Excess Plan does not apply to:

**a.** The part of any CLAIM seeking punitive, exemplary or statutorily enhanced damages; or

**b.** Any CLAIM for or arising out of the imposition of attorney fees, costs, fines, penalties, or other sanctions imposed under any federal or state statute, administrative rule, court rule, or case law intended to penalize bad faith conduct, false or unwarranted certification in a pleading, ~~and~~ or the assertion of frivolous or bad faith claims or defenses. The PLF will defend the COVERED PARTY against such a CLAIM, but any liability for indemnity arising from such CLAIM will be excluded.

~~{BUSINESS ACTIVITY EXCLUSIONS}~~

**5. Business Role Exclusion.** This Excess Plan does not apply to that part of any CLAIM based upon or arising out of any COVERED PARTY'S conduct as an officer, director, partner, BUSINESS TRUSTEE, employee, shareholder, member, or manager of any entity except a LAW ENTITY.

**6. Business Ownership Interest Exclusion.** This Excess Plan does not apply to any CLAIM ~~by or on behalf~~based on or arising out of any business enterprise:

**a.** In which any COVERED PARTY has an ownership interest or had an ownership interest at the time of the alleged acts, errors, or omissions upon which the CLAIM is based;

**b.** In which any COVERED PARTY is a general partner, managing member, or employee, or was a general partner, managing member, or employee at the time of the alleged acts, errors, or omissions upon which the CLAIM is based; or

**c.** That is controlled, operated, or managed by any COVERED PARTY, either individually or in a fiduciary capacity, including the ownership, maintenance, or use of any property in connection therewith, or was so controlled, operated, or managed at the time of the alleged acts, errors, or omissions upon which the CLAIM is based.

Ownership interest, for purposes of this exclusion, will not include any ownership interest now or previously held solely as a passive investment as long as all COVERED PARTIES, those they control,

spouses, parents, step-parents, children, step-children, siblings, or any member of their households, collectively now own or previously owned an interest of 10 percent or less in the business enterprise.

7. **Partner and Employee Exclusion.** This Excess Plan does not apply to any CLAIM made by:

- a. THE FIRM'S present, former, or prospective partner, employer, or employee, or
- b. A present, former, or prospective officer, director, or employee of a professional corporation in which any COVERED PARTY is or was a shareholder,

unless such CLAIM arises out of conduct in an attorney-client capacity for one of the parties listed in Subsections a or b.

8. **ORPC 1.8 Exclusion.** This Excess Plan does not apply to any CLAIM based upon or arising out of any business transaction subject to ORPC 1.8(a) or its equivalent in which any COVERED PARTY participated with a client unless any required written disclosure has been properly executed in compliance with that rule in the form of Disclosure Form ORPC 1, attached as Exhibit A to this Excess Plan, and has been properly executed by any COVERED PARTY and his or her client prior to the ~~occurrence-business transaction~~ giving rise to the CLAIM, ~~and either:~~

~~a. A copy of the executed disclosure form is forwarded to the PLF within ten (10) calendar days of execution, or~~

~~b. If delivery of a copy of the disclosure form to the PLF within ten (10) calendar days of execution would violate ORPC 1.6, ORS 9.460(3), or any other rule governing client confidences and secrets, the COVERED PARTY may instead send the PLF an alternative letter stating: (1) the name of the client with whom the COVERED PARTY is participating in a business transaction; (2) that the COVERED PARTY has provided the client with a disclosure letter pursuant to the requirements of ORPC 1.0(g) and 1.8(a) or their equivalents; (3) the date of the disclosure letter; and (4) that providing the PLF with a copy of the disclosure letter at the present time would violate applicable rules governing client confidences and secrets. This alternative letter must be delivered to the PLF within ten (10) calendar days of execution of the disclosure letter.~~

9. **Investment Advice Exclusion.** This Excess Plan does not apply to any CLAIM based upon or arising out of any act, error, or omission in the course of providing INVESTMENT ADVICE if the INVESTMENT ADVICE is in fact either the sole cause or a contributing cause of any resulting damage. However, if all of the INVESTMENT ADVICE constitutes a COVERED ACTIVITY described in Section III.3, this exclusion will not apply unless part or all of such INVESTMENT ADVICE is described in Subsections d, e, f, or g of the definition of INVESTMENT ADVICE in Section I.10 of the PLF CLAIMS MADE PLAN.

#### **{PERSONAL RELATIONSHIP AND BENEFITS EXCLUSIONS}**

10. **Law Practice Business Activities or Benefits Exclusion.** This Excess Policy does not apply to any CLAIM:

a. For any amounts paid, incurred or charged by any COVERED PARTY, as fees, costs, or disbursements, (or by any LAW ENTITY with which the COVERED PARTY, THE FIRM, or any other LAW ENTITY was associated at the time the fees, costs or expenses were paid, incurred or charged), including but not limited to fees, costs and disbursements alleged to be excessive, not earned, or negligently incurred, whether claimed as restitution of specific funds, forfeiture, financial loss, set-off or otherwise.

b. Arising from or relating to the negotiation, securing, or collection of fees, costs, or disbursements

owed or claimed to be owed to a COVERED PARTY, THE FIRM, or any LAW ENTITY with which the COVERED PARTY is now associated, or was associated at the time of the conduct giving rise to the CLAIM; or

c. For damages or the recovery of funds or property that have or will directly or indirectly benefit any COVERED PARTY or THE FIRM.

d. In the event the PLF defends any claim or suit that includes any claim within the scope of this exclusion, it will have the right to settle or attempt to dismiss any other claim(s) not falling within this exclusion, and to withdraw from the defense following the settlement or dismissal of any such claim(s).

This exclusion does not apply to any CLAIM based on an act, error or omission by any COVERED PARTY regarding a client's right or ability to recover fees, costs, or expenses from an opposing party, pursuant to statute or contract.

~~a. For the return of any fees, costs, or disbursements, including but not limited to fees, costs, and disbursements alleged to be excessive, not earned, or negligently incurred;~~

~~b. Arising from or relating to the negotiation, securing, or collection of fees, costs, or disbursements; or~~

~~c. For damages or the recovery of funds or property that have or will directly or indirectly benefit any COVERED PARTY.~~

**11. Family Member and Ownership Exclusion.** This Excess Plan does not apply to any CLAIM based upon or arising out of an attorney COVERED PARTY'S legal services performed on behalf of the attorney COVERED PARTY'S spouse, parent, step-parent, child, step-child, sibling, or any member of his or her household, or on behalf of a business entity in which any of them, individually or collectively, have a controlling interest, based upon or arising out of the acts, errors, or omissions of that COVERED PARTY.

#### COMMENTS

*Work performed for family members is not covered under this Excess Plan. A CLAIM based upon or arising out of such work, even for example a CLAIM against other lawyers or THE FIRM for failure to supervise will be excluded from coverage. This exclusion does not apply, however, if one attorney performs legal services for another attorney's family member.*

**12. Benefit Plan Fiduciary Exclusion.** This Excess Plan does not apply to any CLAIM arising out of any COVERED PARTY'S activity as a fiduciary under any employee retirement, deferred benefit, or other similar plan.

**13. Notary Exclusion.** This Excess Plan does not apply to any CLAIM arising out of any witnessing of a signature or any acknowledgment, verification upon oath or affirmation, or other notarial act without the physical appearance before such witness or notary public, unless such CLAIM arises from the acts of THE FIRM'S employee and no COVERED PARTY has actual knowledge of such act.

~~{GOVERNMENT ACTIVITY EXCLUSION}~~

**14. Government Activity Exclusion.** This Excess Plan does not apply to any CLAIM arising out of any conduct:

- a. As a public official or an employee of a governmental body, subdivision, or agency; or
- b. In any other capacity which comes within the defense and indemnity requirements of ORS 30.285 and 30.287 or other similar state or federal statute, rule, or case law. If a public body rejects the defense and indemnity of such a CLAIM, the PLF will provide coverage for such COVERED ACTIVITY and will be subrogated to all rights against the public body.

~~{HOUSE COUNSEL EXCLUSION}~~

**15. House Counsel Exclusion.** This Excess Plan does not apply to any CLAIM arising out of any conduct as an employee in an employer-employee relationship other than as an employee for a LAW ENTITY.

~~{GENERAL TORTIOUS CONDUCT EXCLUSIONS}~~

**16. General Tortious Conduct Exclusions.** This Excess Plan does not apply to any CLAIM against any COVERED PARTY for:

- a. Bodily injury, sickness, disease, or death of any person;
- b. Injury to, loss of, loss of use of, or destruction of any real, personal, or intangible property; or
- c. Mental anguish or emotional distress in connection with any CLAIM described under Subsections a or b.

This exclusion does not apply to any CLAIM made under ORS 419B.010 if the CLAIM arose from an otherwise COVERED ACTIVITY.

**17. Unlawful Harassment and Discrimination Exclusion.** This Excess Plan does not apply to any CLAIM based on or arising out of harassment or discrimination on the basis of race, creed, age, religion, sex, sexual preference, disability, pregnancy, national origin, marital status, or any other basis prohibited by law.

~~{PATENT EXCLUSION}~~

**18. Patent Exclusion.** This Excess Plan does not apply to any CLAIM based upon or arising out of professional services performed or any act, error, or omission committed in relation to the prosecution of a patent if the COVERED PARTY who performed the services was not registered with the U.S. Patent and Trademark Office at the time the CLAIM arose.

**19. Reserved.**

~~{CONTRACTUAL OBLIGATION EXCLUSION}~~

**20. Contractual Obligation Exclusion.** This Plan does not apply to any CLAIM:

- a. Based upon or arising out of any bond or any surety, guaranty, warranty, joint control, or similar agreement, or any assumed obligation to indemnify another, whether signed or otherwise agreed to by ~~YOU a COVERED PARTY~~ or someone for whose conduct ~~any COVERED PARTY YOU are~~ is legally liable, unless the CLAIM arises out of a COVERED ACTIVITY described in SECTION III.3 and the person against whom the CLAIM is made signs the bond or agreement solely in that capacity;

- b. Any costs connected to ORS 20.160 or similar statute or rule;
- c. For liability based on an agreement or representation, if the Covered Party would not have been liable in the absence of the agreement or representation; or
- d. Claims in contract based upon an alleged promise to obtain a certain outcome or result.

~~{BANKRUPTCY TRUSTEE EXCLUSION}~~

**21. Bankruptcy Trustee Exclusion.** This Excess Plan does not apply to any CLAIM arising out of any COVERED PARTY'S activity as a bankruptcy trustee.

~~{OFFICE SHARING EXCLUSION}~~

**22. Private Data Exclusion.** This Excess Plan does not apply to any CLAIM arising out of or related to the loss, compromise or breach of or access to confidential or private information or data. If the PLF agrees to defend a SUIT that includes a CLAIM that falls within this exclusion, the PLF will not pay any CLAIMS EXPENSE relating to such CLAIM. ~~This Excess Plan does not apply to any CLAIM alleging the vicarious liability of any COVERED PARTY under the doctrine of apparent partnership, partnership by estoppel, or any similar theory, for the acts, errors, or omissions of any attorney, professional corporation, or other entity not listed in the Declarations with whom THE FIRM or attorney COVERED PARTIES shared office space or office facilities at the time of any of the alleged acts, errors, or omissions.~~

COMMENTS

There is a growing body of law directed at protecting confidential or private information from disclosure. The protected information or data may involve personal information such as credit card information, social security numbers, drivers licenses, or financial or medical information. They may also involve business-related information such as trade secrets or intellectual property. Examples of loss, compromise, breach or access include but are not limited to electronically stored information or data being inadvertently disclosed or released by a COVERED PARTY; being compromised by the theft, loss or misplacement of a computer containing the data; being stolen or intentionally damaged; or being improperly accessed by a COVERED PARTY or someone acting on his or her behalf. However, such information or data need not be in electronic format, and a data breach caused through, for example, the improper safeguarding or disposal of paper records would also fall within this exclusion.

There may be many different costs incurred to respond to a data breach, including but not limited to notification costs, credit monitoring costs, forensic investigations, computer reprogramming, call center support and/or public relations. The PLF will not pay for any such costs, even if the PLF is otherwise providing a defense.

~~{EXCLUDED ATTORNEY EXCLUSION}~~

**23. Excluded Attorney Exclusion.** This Excess Plan does not apply to any CLAIM against any COVERED PARTY:

a. Arising from or relating to any act, error, or omission of any EXCLUDED ATTORNEY in any capacity or context, whether or not the COVERED PARTY personally participated in any such act, error, or omission or is vicariously liable, or

b. Alleging liability for the failure of a COVERED PARTY or any other person or entity to supervise, control, discover, prevent, or mitigate any activities of or harm caused by any EXCLUDED ATTORNEY.

~~{EXCLUDED FIRM EXCLUSION}~~

**24. Excluded Firm Exclusion.** This Excess Plan does not apply to any CLAIM made against a COVERED PARTY:

a. Which arises from or is related to any act, error, or omission of:

(1) An EXCLUDED FIRM, or

(2) A past or present partner, shareholder, associate, attorney, or employee (including any COVERED PARTY) of an EXCLUDED FIRM while employed by, a partner or shareholder of, or in any way associated with an EXCLUDED FIRM,

in any capacity or context, and whether or not the COVERED PARTY personally participated in any such act, error, or omission or is vicariously liable therefore, or

b. Alleging liability for the failure of a COVERED PARTY or any other person or entity to supervise, control, discover, prevent, or mitigate any activities of or harm caused by any EXCLUDED FIRM or any person described in Subsection a(2) above.

~~{CONFIDENTIAL OR PRIVATE DATA EXCLUSION}~~

**25. Office Sharing Exclusion.** ~~This Excess Plan does not apply to any CLAIM alleging the vicarious liability of any COVERED PARTY under the doctrine of apparent partnership, partnership by estoppel, or any similar theory, for the acts, errors, or omissions of any attorney, professional corporation, or other entity not listed in the Declarations with whom THE FIRM or attorney COVERED PARTIES shared office space or office facilities at the time of any of the alleged acts, errors, or omissions. Confidential or This Excess Plan does not apply to any CLAIM arising out of or related to the loss, compromise or breach of or access to confidential or private information or data. If the PLF agrees to defend a SUIT that includes a CLAIM that falls within this exclusion, the PLF will not pay any CLAIMS EXPENSE relating to such CLAIM.~~

~~COMMENTS~~

~~————— There is a growing body of law directed at protecting confidential or private information from disclosure. The protected information or data may involve personal information such as credit card information, social security numbers, drivers licenses, or financial or medical information. They may also involve business related information such as trade secrets or intellectual property. Examples of loss, compromise, breach or access include but are not limited to electronically stored information or data being inadvertently disclosed or released by a Covered Party; being compromised by the theft, loss or misplacement of a computer containing the data; being stolen or intentionally damaged; or being improperly accessed by a Covered Party or someone acting on his or her behalf. However, such information or data need not be in electronic format, and a data breach caused through, for example, the~~

~~improper safeguarding or disposal of paper records would also fall within this exclusion.~~

~~There may be many different costs incurred to respond to a data breach, including but not limited to notification costs, credit monitoring costs, forensic investigations, computer reprogramming, call-center support and/or public relations. The PLF will not pay for any such costs, even if the PLF is otherwise providing a defense.~~

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## SECTION VI – LIMITS OF COVERAGE AND DEDUCTIBLE

### 1. Limits of Coverage

a. Regardless of the number of COVERED PARTIES under this Excess Plan, the number of persons or organizations who sustain damage, or the number of CLAIMS made, the PLF's maximum liability for indemnity and CLAIMS EXPENSE under this Excess Plan will be limited to the amount shown as the Limits of Coverage in the Declarations, less the Deductible listed in the Declarations, if applicable. The making of CLAIMS against more than one COVERED PARTY does not increase the PLF's Limit of Coverage.

b. If the SAME OR RELATED CLAIMS are made in the PLAN YEAR of this Excess Plan and the PLAN YEARS of other Excess Plans issued to THE FIRM by the PLF, then only a single Limit of Coverage will apply to all such CLAIMS.

### 2. Deductible

a. The Deductible for COVERED PARTIES under this Excess Plan who are not also covered under the PLF CLAIMS MADE PLAN is either the maximum Limit of Liability for indemnity and Claims Expense under any insurance policy covering the CLAIM or, if there is no such policy or the insurer is either insolvent, bankrupt, or in liquidation, the amount listed in Section 5 of the Declarations.

b. THE FIRM is obligated to pay any Deductible not covered by insurance. The PLF's obligation to pay any indemnity or CLAIMS EXPENSE as a result of a CLAIM for which a Deductible applies is only in excess of the applicable amount of the Deductible. The Deductible applies separately to each CLAIM, except for SAME OR RELATED CLAIMS. The Deductible amount must be paid by THE FIRM as CLAIMS EXPENSES are incurred or a payment of indemnity is made. At the PLF's option, it may pay such CLAIMS EXPENSES or indemnity, and THE FIRM will be obligated to reimburse the PLF for the Deductible within ten (10) days after written demand from the PLF.

#### COMMENTS

*The making of the SAME OR RELATED CLAIMS against one or more lawyers in THE FIRM will not "stack" or create multiple Limits of Coverage. This is true even if the CLAIMS are made in different Plan Years. In that event, the applicable limit will be available limits from the Excess Plan in effect in the Plan Year in which the SAME OR RELATED CLAIMS are deemed first made. In no event will more than one Limit of Liability be available for all such CLAIMS.*

*Under the PLF CLAIMS MADE PLAN, the SAME OR RELATED CLAIMS will result in only one Limit of Coverage being available, even if CLAIMS are made against COVERED PARTIES in different LAW ENTITIES. The Excess Plan works differently.*



*The limits of Excess Plans issued to different firms may, where appropriate, “stack”; Excess Plans issued to any one firm do not. If SAME OR RELATED CLAIMS are made against COVERED PARTIES under Excess Plans issued by the PLF to two or more Law Firms, the available Limit of Coverage for THE FIRM under this Excess Plan will not be affected by the Limits of Coverage in other Excess Plans. THE FIRM, however, cannot “stack” limits of multiple Excess Plans issued to it for the SAME OR RELATED CLAIMS.*

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## SECTION VII – NOTICE OF CLAIMS

- 1.** THE FIRM must, as a condition precedent to the right of protection afforded any COVERED PARTY by this coverage, give the PLF, at the address shown in the Declarations, written notice of any CLAIM that is reasonably likely to involve any of the coverages of this Excess Plan. In the event a SUIT is brought against any COVERED PARTY, which is reasonably likely to involve any of the coverages of this Excess Plan, THE FIRM must immediately notify and deliver to the PLF, at the address shown in the Declarations, every demand, notice, summons, or other process received by the COVERED PARTY or the COVERED PARTY'S representatives.
- 2.** If during the COVERAGE PERIOD, any COVERED PARTY becomes aware of facts or circumstances that reasonably could be expected to be the basis of a CLAIM for which coverage may be provided under this Excess Plan, THE FIRM must give written notice to the PLF as soon as practicable during the COVERAGE PERIOD of:
  - a.** The specific act, error, or omission;
  - b.** The injury or damage that has resulted or may result; and
  - c.** The circumstances by which the COVERED PARTY first became aware of such act, error, or omission.
- 3.** If the PLF opens a suspense or claim file involving a CLAIM or potential CLAIM which otherwise would require notice from the COVERED PARTY under Subsection 1. or 2. above, the COVERED PARTY'S obligations under those subsections will be considered satisfied for that CLAIM or potential CLAIM.

### COMMENTS

*This is a Claims Made Plan. Section IV.1.b determines when a CLAIM is first made for the purpose of triggering coverage under this Plan. Section VII states the COVERED PARTY'S obligation to provide the PLF with prompt notice of CLAIMS, SUITS, and potential CLAIMS.*

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## SECTION VIII – COVERAGE DETERMINATIONS

- 1.** This Excess Plan is governed by the laws of the State of Oregon, regardless of any conflict-of-law principle that would otherwise result in the laws of any other jurisdiction governing this Excess Plan. Any dispute as to the applicability, interpretation, or enforceability of this Excess Plan, or any other issue pertaining to the provision of benefits under this Excess Plan, between any COVERED PARTY (or anyone

claiming through a COVERED PARTY) and the PLF will be tried in the Multnomah County Circuit Court of the State of Oregon, which will have exclusive jurisdiction and venue of such disputes at the trial level.

**2.** The PLF will not be obligated to provide any amounts in settlement, arbitration award, judgment, or indemnity until all applicable coverage issues have been finally determined by agreement or judgment.

**3.** In the event of exceptional circumstances in which the PLF, at the PLF's option, has paid a portion or all Limits of Coverage toward settlement of a CLAIM before all applicable coverage issues have been finally determined, then resolution of the coverage dispute as set forth in this Section will occur as soon as reasonably practicable following the PLF's payment. In the event it is determined that this Excess Plan is not applicable to the CLAIM, or only partially applicable, then judgment will be entered in Multnomah County Circuit Court in the PLF's favor and against the COVERED PARTY (and all others on whose behalf the PLF's payment was made) in the amount of any payment the PLF made on an uncovered portion of the CLAIM, plus interest at the rate applicable to judgments from the date of the PLF's payment. Nothing in this Section creates an obligation by the PLF to pay a portion or all of the PLF's Limits of Coverage before all applicable coverage issues have been fully determined.

**4.** The bankruptcy or insolvency of a COVERED PARTY will not relieve the PLF of its obligations under this Excess Plan.

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## SECTION IX – ASSISTANCE, COOPERATION, AND DUTIES OF COVERED PARTY

As a condition of coverage under this Excess Plan, every COVERED PARTY must satisfy all conditions of the PLF CLAIMS MADE PLAN.

### COMMENTS

*Among the conditions of coverage referred to in this section are the conditions of coverage stated at Section IX of the PLF PLAN.*

*The obligations of the COVERED PARTIES under this section as well as the other sections of the Excess Plan are to be performed without charge to the PLF.*

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## SECTION X – ACTIONS BETWEEN THE PLF AND COVERED PARTIES

**1.** No legal action in connection with this Excess Plan may be brought against the PLF unless all COVERED PARTIES have fully complied with all terms of this Excess Plan.

**2.** The PLF may bring an ACTION against a COVERED PARTY if:

**a.** The PLF pays a CLAIM under this Excess Plan or any other Excess Plan issued by the PLF;

**b.** The COVERED PARTY under this Excess Plan is alleged to be liable for all or part of the damages paid by the PLF;

c. As between the COVERED PARTY and the person or entity on whose behalf the PLF has paid the CLAIM, the latter has an alleged right to pursue the COVERED PARTY for contribution, indemnity, or otherwise, for all or part of the damages paid; and

d. Such right can be alleged under a theory or theories for which no coverage is provided to the COVERED PARTY under this Excess Plan.

3. In the circumstances outlined in Subsection 2, the PLF reserves the right to sue the COVERED PARTY, either in the PLF's name or in the name of the person or entity on whose behalf the PLF has paid, to recover such amounts as the PLF determines appropriate up to the full amount the PLF has paid. However, this section shall not entitle the PLF to sue the COVERED PARTY if the PLF's alleged rights against the COVERED PARTY are premised on a theory of recovery which would entitle the COVERED PARTY to indemnity under this Excess Plan if the PLF's action were successful.

#### COMMENTS

*Under certain circumstances, a claim against a COVERED PARTY may not be covered because of an exclusion or other applicable provision of the Excess Plan issued to a firm. However, in some cases the PLF may be required to pay the claim nonetheless because of its obligation to another COVERED PARTY under the terms of the firm's Excess Plan or under another Excess Plan issued by the PLF. This might occur, for example, when the attorney responsible for a claim has no coverage due to his or her intentional wrongful conduct, but his or her partner did not engage in or know of the wrongful conduct but is nevertheless allegedly liable. In these circumstances, if the PLF pays some or all of the claim arising from the responsible attorney's conduct, it ~~is only fair that~~ the PLF ~~have the right to~~ seek recovery back from that attorney; otherwise, the PLF would effectively be covering the attorney's non-covered claims under this Excess Plan simply because other COVERED PARTIES were also liable.*

Example: Attorney A misappropriates trust account funds belonging to Client X.

*Attorney A's partner, Attorney B, does not know of or acquiesce in Attorney A's wrongful conduct. Client X sues both Attorneys A and B. Attorney A has no coverage for the claim under his applicable PLF PLAN or the firm's Excess Plan, but Attorney B has coverage for her liability under an Excess Plan issued by the PLF. The PLF pays the claim. Section X.2 makes clear the PLF has the right to sue Attorney A for the damages the PLF paid.*

Example: Same facts as prior example, except that the PLF loans funds to the person or entity liable under terms which obligate the borrower to repay the loan to the extent the borrower recovers damages from Attorney A in an action for indemnity. Section X.2 makes clear the PLF has the right pursuant to such arrangement to participate in the borrower's indemnity action against Attorney A.

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## SECTION XI – SUPPLEMENTAL ASSESSMENTS

This Excess Plan is assessable. Each PLAN YEAR is accounted for and assessable using reasonable accounting standards and methods of assessment. If the PLF determines in its discretion that a supplemental assessment is necessary to pay for CLAIMS, CLAIMS EXPENSE, or other expenses arising from or incurred during either this PLAN YEAR or a previous PLAN YEAR, THE FIRM agrees to pay its supplemental assessment to the PLF within thirty (30) days of request. THE FIRM further agrees that

liability for such supplemental assessments shall be joint and several among THE FIRM and the partners, shareholders, and professional corporations listed as FIRM ATTORNEYS in the Declarations.

The PLF is authorized to make additional assessments for this PLAN YEAR until all its liability for this PLAN YEAR is terminated, whether or not any COVERED PARTY maintains coverage under an Excess Plan issued by the PLF at the time assessments are imposed.

#### COMMENTS

*This section is limited to a statement of the COVERED PARTIES' contractual obligation to pay supplemental assessments should the assessments originally levied be inadequate to pay all claims, claims expense, and other expenses arising from this PLAN YEAR. It is not intended to cover other assessments levied by the PLF, such as the assessment initially paid to purchase coverage under this Excess Plan or any regular or special underwriting assessment paid by any member of THE FIRM in connection with the primary PLF PLAN.*

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## SECTION XII – RELATION OF THE PLF'S COVERAGE TO INSURANCE COVERAGE OR OTHER COVERAGE

If any COVERED PARTY has valid and collectible insurance coverage or other obligation to indemnify, including but not limited to self-insured retentions, deductibles, or self insurance, which also applies to any loss or CLAIM covered by this Excess Plan, the PLF will not be liable under this Excess Plan until the limits of the COVERED PARTY'S insurance or other obligation to indemnify, including any applicable deductible, have been exhausted, unless such insurance or other obligation to indemnify is written only as specific excess coverage over the Limits of Coverage of this Excess Plan.

#### COMMENTS

*This Excess Plan is not an insurance policy. To the extent that insurance or other coverage exists, this Excess Plan may not be invoked. This provision is designed to preclude the application of the other insurance law rules applicable under Lamb-Weston v. Oregon Automobile Ins. Co., 219 Or 110, 341 P2d 110, 346 P2d 643 (1959).*

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## SECTION XIII – WAIVER AND ESTOPPEL

Notice to or knowledge of the PLF's representative, agent, employee, or any other person will not effect a waiver, constitute an estoppel, or be the basis of any change in any part of this Excess Plan, nor shall the terms of this Excess Plan be waived or changed except by written endorsement issued and signed by the PLF's authorized representative.

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## SECTION XIV – EXTENDED REPORTING COVERAGE

THE FIRM becomes eligible to purchase extended reporting coverage after 24 months of continuous excess coverage with the PLF. Upon termination or cancellation of this Excess Plan by either THE FIRM

or the PLF, THE FIRM, ~~may be eligible if qualified, has the right~~ to purchase extended reporting coverage for one of the following periods for an additional assessment equal to the percent shown below of the assessment levied against THE FIRM for this Excess Plan (as calculated on an annual basis). Eligibility for any extended reporting coverage is determined by the PLF's underwriting department based on the FIRM's claims experience and other underwriting factors.

<b>Extended Reporting Coverage Period</b>	<b>Additional Assessment</b>
12 Months	100 percent
24 Months	160 percent
36 Months	200 percent
60 Months	250 percent

THE FIRM must exercise this right and pay the assessment within 30 days after the termination or cancellation. Failure to exercise THE FIRM'S right and make payment within this 30-day period will result in forfeiture of all THE FIRM'S rights under this Section.

If THE FIRM qualifies for extended reporting coverage under this Section and timely exercises its rights and pays the required assessment, it will be issued an endorsement extending the period within which a CLAIM can be first made for the additional reporting period after the date of termination or cancellation which THE FIRM has selected. This endorsement will not otherwise change the terms of this Excess Plan. The right to extended reporting coverage under this Section will not be available if cancellation is by the PLF because of:

- a. The failure to pay when due any assessment or other amounts to the PLF; or
- b. The failure to comply with any other term or condition of this Excess Plan.

#### COMMENTS

*This section sets forth THE FIRM'S right to extended reporting coverage. Exercise of the rights hereunder does not establish new or increased limits of coverage and does not extend the period during which the COVERED ACTIVITY must occur to be covered by this Excess Plan.*

*Example: A firm obtains excess coverage from the PLF in Year 1, but discontinues coverage in Year 2. The firm exercises its rights under Section XIV of the Year 1 Excess Plan and purchases an extended reporting coverage period of 36 months during the first 30 days of Year 2. A CLAIM is made against THE FIRM in March of Year 3 based upon a COVERED ACTIVITY of a firm member occurring in October of Year 1. Because the claim was made during the 36-month extended reporting coverage period and arose from a COVERED ACTIVITY occurring during the COVERAGE PERIOD, it is covered under the terms and within the remaining Limits of Coverage of THE FIRM'S Year 1 Excess Plan.*

*Example: Same facts as prior example, except the claim which is made against THE FIRM in March of Year 3 is based upon an alleged error of a firm member occurring in January of Year 2. Because the alleged error occurred after the end of the COVERAGE PERIOD for the Year 1 Excess Plan, the claim does not fall within the terms of the*

*extended reporting coverage and so there is no coverage for the claim under THE FIRM'S Year 1 Excess Plan.*

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## SECTION XV – ASSIGNMENT

THE FIRM'S interest hereunder and the interest of any COVERED PARTY is not assignable.

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## SECTION XVI – OTHER CONDITIONS

### 1. Application

A copy of the Application which THE FIRM submitted to the PLF in seeking coverage under this Excess Plan is attached to and shall be deemed a part of this Excess Plan. All statements and descriptions in the Application are deemed to be representations to the PLF upon which it has relied in agreeing to provide THE FIRM with coverage under this Excess Plan. Any misrepresentations, omissions, concealments of fact, or incorrect statements will negate coverage and prevent recovery under this Excess Plan if the misrepresentations, omissions, concealments of fact, or incorrect statements:

- a. Are contained in the Application;
- b. Are material and have been relied upon by the PLF; and
- c. Are either:
  - (1) Fraudulent; or
  - (2) Material either to the acceptance of the risk or to the hazard assumed by the PLF.

### 2. Cancellation

a. This Excess Plan may be canceled by THE FIRM by surrender of the Excess Plan to the PLF or by mailing or delivering written notice to the PLF stating when thereafter such cancellation will be effective. If canceled by THE FIRM, the PLF will retain the assessment on a pro rata basis.

b. This Excess Plan may be canceled by the PLF for any of the following reasons:

(1) IF THE FIRM has failed to pay an assessment when due, the PLF may cancel the Excess Plan by mailing to THE FIRM written notice stating when, not less than ten (10) days thereafter, such cancellation shall be effective.

(2) Other than for nonpayment of assessments as provided for in Subsection b(1) above, coverage under this Excess Plan may be canceled by the PLF prior to the expiration of the COVERAGE PERIOD only for one of the following specific reasons:

- a. Material misrepresentation by any COVERED PARTY;
- b. Substantial breaches of contractual duties, conditions, or warranties by any COVERED PARTY; or

c. Revocation, suspension, or surrender of any COVERED PARTY'S license or right to practice law.

Such cancellation may be made by mailing or delivering of written notice to THE FIRM stating when, not less than ten (10) days thereafter, such cancellation shall be effective.

The time of surrender of this Excess Plan or the effective date and hour of cancellation stated in the notice shall become the end of the COVERAGE PERIOD. Delivery of a written notice either by THE FIRM or by the PLF will be equivalent to mailing. If the PLF cancels, assessments shall be computed and refunded to THE FIRM pro rata. Assessment adjustment may be made either at the time cancellation is effected or as soon as practicable thereafter.

### **3. Termination**

This Excess Plan is non-renewable. This Excess Plan will automatically terminate on the date and time shown as the end of the COVERAGE PERIOD in the Declarations unless canceled by the PLF or by THE FIRM in accordance with the provisions of this Excess Plan prior to such date and time.



**~~EXHIBIT A -- FORM ORPC-1~~**

~~Dear [Client]:~~

~~This letter confirms that we have discussed [specify the essential terms of the business transaction that you intend to enter into with your client and your role in the transaction. Be sure to inform the client whether you will be representing the client in the transaction. This is required by ORPC 1.8(a)(3)]. This letter also sets forth the conflict of interest that arises for me as your attorney because of this proposed business transaction.~~

~~The Oregon Rules of Professional Conduct prohibit an attorney from representing a client when the attorney's personal interests conflict with those of the client unless the client consents. Consequently, I can only act as your lawyer in this matter if you consent after being adequately informed. Rule 1.0(g) provides as follows:\_\_\_\_\_~~

~~(g) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct. When informed consent is required by these Rules to be confirmed in writing or to be given in a writing signed by the client, the lawyer shall give and the writing shall reflect a recommendation that the client seek independent legal advice to determine if consent should be given.~~

~~Although our interests presently appear to be consistent, my interests in this transaction could at some point be different than or adverse to yours. Specifically, [include an explanation which is sufficient to apprise the client of the potential adverse impact on the client of the matter to which the client is asked to consent, and any reasonable alternative courses of action, if applicable].~~

~~Please consider this situation carefully and decide whether or not you wish to enter into this transaction with me and to consent to my representation of you in this transaction. Rule 1.8(a)(2) requires me to recommend that you consult with another attorney in deciding whether or not your consent should be given. Another attorney could also identify and advise you further on other potential conflicts in our interests.~~

~~I enclose an article "Business Deals Can Cause Problems," which contains additional information.~~

~~If you do decide to consent, please sign and date the enclosed extra copy of this letter in the space provided below and return it to me.~~

~~Very truly yours,~~

~~[Attorney Name and Signature]~~

~~I hereby consent to the legal representation, the terms of the business transaction, and the lawyer's role in transaction as set forth in this letter:~~

\_\_\_\_\_  
\_\_\_\_\_  
~~[Client's Signature] [Date]~~

~~Enclosure: "Business Deals Can Cause Problems," by Jeffrey D. Sapiro.~~



~~**BUSINESS DEALS CAN CAUSE PROBLEMS** (Complying With ORPC 1.8(a))~~

~~By Jeffrey D. Sapiro, Disciplinary Counsel, Oregon State Bar~~

~~Something that clients often lose sight of is that attorneys are not only legal advisors, but are business people as well. It is no secret that most practitioners wish to build a successful practice, rendering quality legal services to their clients, as a means of providing a comfortable living for themselves and/or their families. Given this objective, it is not surprising that many attorneys are attracted to business opportunities outside their practices that may prove to be financially rewarding. The fact that these business opportunities are often brought to an attorney's attention by a client or through involvement in a client's financial affairs is reason to explore the ethical problems that may arise.~~

~~ORPC 1.8(a) and 1.0(g) read as follows:—~~

~~**Rule 1.8 Conflict of Interest: Current Clients: Specific Rules**~~

~~(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:~~

~~(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;~~

~~(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and~~

~~(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.~~

~~**ORPC 1.0 Terminology—**~~

~~(g) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct. When informed consent is required by these Rules to be confirmed in writing or to be given in a writing signed by the client, the lawyer shall give and the writing shall reflect a recommendation that the client seek independent legal advice to determine if consent should be given.~~

~~The rationale behind this rule should be obvious. An attorney has a duty to exercise professional judgment solely for the benefit of a client, independent of any conflicting influences or loyalties. If an attorney is motivated by financial interests adverse to that of the client, the undivided loyalty due to the client may very well be compromised. (See also ORPC 1.7 and 1.8(c) and (i)) Full disclosure in writing gives the client the opportunity and necessary information to obtain independent legal advice when the attorney's judgment may be affected by personal interest. Under ORPC 1.8(a) it is the client and not the attorney who should decide upon the seriousness of the potential conflict and whether or not to seek separate counsel.~~

~~A particularly dangerous situation is where the attorney not only engages in the business aspect of a transaction, but also furnishes the legal services necessary to put the deal together. In *In re Brown*, 277 Or 121, 559 P2d 884, rev. den. 277 Or 731, 561 P2d 1030 (1977), an attorney became partners with a friend of many years in a timber business, the attorney providing legal services and the friend providing the capital. The business later incorporated, with the attorney drafting all corporate documents, including a buy-sell agreement permitting the surviving stockholder to purchase the other party's stock. The Oregon Supreme Court found that the interests of the parties were adverse for a number of reasons, including the disparity in capital invested and the difference in the parties' ages, resulting in a potential benefit to the younger attorney under the buy-sell provisions. Despite the fact that the friend was an experienced businessman, the court held that the attorney violated the predecessor to ORPC 1.8(a);~~

~~DR 5-104(A), because the friend was never advised to seek independent legal advice.~~

~~Subsequent to *Brown*, the Supreme Court has disciplined several lawyers for improper business transactions with clients. Among these cases are *In re Drake*, 292 Or 704, 642 P2d 296 (1982), which provides a comprehensive analysis of ORPC 1.8(a)'s predecessor, DR 5-104(A); *In re Montgomery*, 292 Or 796, 643 P2d 338 (1982), in which the fact that the client was a more sophisticated business person than the attorney did not affect the court's analysis; *In re Germundson*, 201 Or 656, 724 P2d 793 (1986), in which a close friendship between the attorney and the client was deemed insufficient reason to dispense with conflict disclosures; and *In re Griffith*, 304 Or 575, 748 P2d (1987), in which the court noted that, even if no conflict is present when a transaction is entered into, subsequent events may lead to a conflict requiring disclosures or withdrawal by the attorney.~~

~~Even in those situations where the attorney does not furnish legal services, problems may develop. There is a danger that, while the attorney may feel he or she is merely an investor in a business deal, the client may believe the attorney is using his or her legal skills to protect the client's interests in the venture. Indeed, this may be the very reason the client approached the attorney with a business proposition in the first place. When a lawyer borrows money from a client, there may even be a presumption that the client is relying on the lawyer for legal advice in the transaction. *In re Montgomery*, 292 Or 796, 643 P2d 338 (1982). To clarify for the client the role played by the attorney in a business transaction, ORPC 1.8(a)(3) now provides that a client's consent to the attorney's participation in the transaction is not effective unless the client signs a writing that describes, among other things, the attorney's role and whether the attorney is representing the client in the transaction.~~

~~In order to avoid the ethical problems addressed by the conflict-of-interest rules, the Supreme Court has said that an attorney must at least advise the client to seek independent legal counsel (*In re Bartlett*, 283 Or 487, 584 P2d 296 (1978)). This is now required by ORPC 1.8(a)(2). The attorney should disclose not only that a conflict of interest may exist, but should also explain the nature of the conflict "in such detail so that (the client) can understand the reasons why it may be desirable for each to have independent counsel. . ." (*In re Boivin*, 271 Or 419, 424, 533 P2d 171 (1975)). Risks incident to a transaction with a client must also be disclosed (ORPC 1.0(g); *In re Montgomery*, 297 Or 738, 687 P2d 157 (1984); *In re Whipple*, 296 Or 105, 673 P2d 172 (1983)). Such a disclosure will help ensure that there is no misunderstanding over the role the attorney is to play in the transaction and will help prevent the attorney from running afoul of the disciplinary rule discussed above.~~

~~201~~ OREGON STATE BAR  
PROFESSIONAL LIABILITY FUND

~~2016~~5 PRO BONO PROGRAM  
CLAIMS MADE MASTER PLAN

NOTICE

This Pro Bono Program Claims Made Master Plan ("Master Plan") contains provisions that reduce the Limits of Coverage by the costs of legal defense. See SECTIONS IV and VI.

Various provisions in this Master Plan restrict coverage. Read the entire Master Plan to determine rights, duties, and what is and is not covered.

INTERPRETATION OF THIS MASTER PLAN

~~**Bracketed Titles.** The bracketed titles appearing throughout this Master Plan are not part of the Master Plan and should not be used as an aid in interpreting the Master Plan. The bracketed titles are intended simply as a guide to locating pertinent provisions.~~

~~**Use of Capitals.** Capitalized terms are defined in SECTION I. The definition of COVERED PARTY appearing in SECTION II and the definition of COVERED ACTIVITY appearing in SECTION III are particularly crucial to the understanding of the Master Plan.~~

**Master Plan Comments.** The discussions labeled "COMMENTS" following various provisions of the Master Plan are intended as aids in interpretation. These interpretive provisions add background information and provide additional considerations to be used in the interpretation and construction of the Master Plan.

~~The Comments are similar in form to those in the Uniform Commercial Code and Restatements. They are intended to aid in the construction of the Master Plan language. The Comments are to assist attorneys in interpreting the coverage available to them and to provide a specific basis for interpretation by courts and arbitrators.~~

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SECTION I — DEFINITIONS

Throughout this Master Plan, when appearing in capital letters:

1. "BUSINESS TRUSTEE" means one who acts in the capacity of or with the title "trustee" and whose activities include the operation, management, or control of any business property, business, or institution in a manner similar to an owner, officer, director, partner, or shareholder.

*COMMENTS*

~~The term "BUSINESS TRUSTEE" is used in SECTION III.3 and in SECTION V.5. This Master Plan is intended to cover the ordinary range of activities in which attorneys typically engage while providing services through a PRO BONO PROGRAM. The Master Plan is not intended to cover BUSINESS TRUSTEE activities as defined in this Subsection. Examples of types of BUSINESS TRUSTEE activities for which coverage is excluded under the Master Plan include, among other things:~~

~~—serving on the board of trustees of a charitable, educational, or religious institution; serving as the trustee for a real estate or other investment syndication; serving as trustee for the liquidation of any business or institution; and serving as trustee for the control of a union or other institution.~~

2. “CLAIM” means a demand for DAMAGES or written notice to a COVERED PARTY of an intent to hold a COVERED PARTY liable as a result of a COVERED ACTIVITY, if such notice might reasonably be expected to result in an assertion of a right to DAMAGES and not otherwise covered under a PLF Claims Made Plan.

3. "CLAIMS EXPENSE" means:

a. Fees and expenses charged by any attorney designated by the PLF;

b. All other fees, costs, and expenses resulting from the investigation, adjustment, defense, repair, and appeal of a CLAIM, if incurred by the PLF; or

c. Fees charged by any attorney designated by the COVERED PARTY with the PLF’s written consent.

However, CLAIMS EXPENSE does not include the PLF’s costs for compensation of its regular employees ~~and officials~~ or the PLF’s other routine administrative costs.

4. "CLAIMS EXPENSE ALLOWANCE" means the separate allowance for aggregate CLAIMS EXPENSE for all CLAIMS as provided for in SECTION VI.1.b. of this Master Plan.

5. "COVERAGE PERIOD" means the coverage period shown in the Declarations under the heading "COVERAGE PERIOD."

6. "COVERED ACTIVITY" means conduct qualifying as such under SECTION III — WHAT IS A COVERED ACTIVITY.

7. "COVERED PARTY" means any person or organization qualifying as such under SECTION II — WHO IS A COVERED PARTY.

8. “DAMAGES” means money to be paid as compensation for harm or loss. It does not refer to fines, penalties, punitive or exemplary damages, or equitable relief such as restitution, disgorgement, rescission, injunctions, accountings or damages and relief otherwise excluded by this Plan.

9. "EXCESS CLAIMS EXPENSE" means any CLAIMS EXPENSE in excess of the CLAIMS EXPENSE ALLOWANCE. EXCESS CLAIMS EXPENSE is included in the Limits of Coverage at SECTION VI.1.a and reduces amounts available to pay DAMAGES under this Master Plan.

10. "INVESTMENT ADVICE" refers to any of the following activities:

a. Advising any person, firm, corporation, or other entity respecting the value of a particular investment, or recommending investing in, purchasing, or selling a particular investment;

b. Managing any investment;

- c. Buying or selling any investment for another;
- d. (1) Acting as a broker for a borrower or lender, or  
 (2) Advising or failing to advise any person in connection with the borrowing of any funds or property by any COVERED PARTY for the COVERED PARTY or for another;
- e. Issuing or promulgating any economic analysis of any investment, or warranting or guaranteeing the value, nature, collectability, or characteristics of any investment;
- f. Giving advice of any nature when the compensation for such advice is in whole or in part contingent or dependent on the success or failure of a particular investment; or
- g. Inducing someone to make a particular investment.

11. "LAW ENTITY" refers to a professional corporation, partnership, limited liability partnership, limited liability company, or sole proprietorship engaged in the private practice of law in Oregon.

12. "MASTER PLAN YEAR" means the period January 1 through December 31 of the calendar year for which this Master Plan was issued.

13. "PLF" means the Professional Liability Fund of the Oregon State Bar.

14. "SAME OR RELATED CLAIMS" means two or more CLAIMS that are based on or arise out of facts, practices, circumstances, situations, transactions, occurrences, COVERED ACTIVITIES, damages, ~~liability~~liabilities, or the relationships of the people or entities involved (including clients, claimants, attorneys, and/or other advisors) that are logically or causally connected or linked or share a common bond or nexus. ~~CLAIMS are related in the following situations~~Examples include, but are not limited to, the following:

- a. *Secondary or dependent liability.* CLAIMS such as those based on vicarious liability, failure to supervise, or negligent referral are related to the CLAIMS on which they are based.
- b. *Same transactions or occurrences.* Multiple CLAIMS arising out of the same transaction or occurrence or series of transactions or occurrences are related. However, with regard to this Subsection b only, the PLF will not treat the CLAIMS as related if:
  - (1) the participating COVERED PARTIES acted independently of one another;
  - (2) they represented different clients or groups of clients whose interests were adverse; and
  - (3) the claimants do not rely on any common theory of liability or damage.
- c. *Alleged scheme or plan.* If claimants ~~attempt to~~ tie together different acts as part of an alleged overall scheme or operation, then the CLAIMS are related.
- d. *Actual pattern or practice.* Even if a scheme or practice is not alleged, CLAIMS that

arise from a method, pattern, or practice in fact used or adopted by one or more COVERED PARTIES or LAW ENTITIES in representing multiple clients in similar matters are related.

e. *One loss.* When successive or collective errors each cause or contribute to single or multiple clients' and/or claimants' harm or cumulatively enhance their damages or losses, then the CLAIMS are related.

f. *Class actions.* All CLAIMS alleged as part of a class action or purported class action are related.

#### COMMENTS

**SAME OR RELATED CLAIMS.** Each PLF Master Plan and PLF Claims Made Plan sets a maximum limit of coverage per year. This limit defines the PLF's total maximum obligation under the terms of each Plan issued by the PLF. However, absent additional Plan provisions, numerous circumstances could arise in which the PLF, as issuer of other PLF Master Plans and PLF Claims Made Plans, would be liable beyond the limits specified in one individual Plan. For example, Plans issued to the same attorney in different years might apply. Or, Plans issued to different attorneys might all apply. In some circumstances, the PLF ~~intends to may~~ extend a separate limit under each Plan. In other circumstances, when the CLAIMS are related, the PLF ~~does not so intend will not extend separate limits under each Plan.~~ Because the concept of "relatedness" is broad and factually based, there is no one definition or rule that will apply to every situation. The PLF has therefore elected to explain its intent by listing certain circumstances in which only one limit is available regardless of the number of Plans that may apply. See Subsections 14.a to 14.f above. To aid in interpretation, the following are examples of SAME OR RELATED CLAIMS:

*Example No. 1: Attorney A is an associate in a firm and commits malpractice. CLAIMS are made against Attorney A and various partners in the firm. All attorneys share one limit. CLAIMS such as those based on vicarious liability, failure to supervise, or negligent referral are always related to the CLAIMS on which they are based. See Subsection 14.a above. Even if Attorney A and some of the other lawyers are at different firms at the time of the CLAIM, all attorneys and the firm share one Limit of Coverage and one CLAIMS EXPENSE ALLOWANCE.*

*Example No. 2: Attorney A writes a tax opinion for an investment offering, and Attorneys B and C with a different law firm assemble the offering circular. Investors 1 and 2 bring CLAIMS in 2010 and Investor 3 brings a CLAIM in 2011 relating to the offering. No CLAIM is asserted prior to 2010. Only one Limit of Coverage applies to all CLAIMS. This is because the CLAIMS arise out of the same transaction or occurrence, or series of transactions or occurrences. See Subsection 14.b above. CLAIMS by investors in the same or similar investments will almost always be related. However, because the CLAIMS in this example are made against COVERED PARTIES in two different firms, up to two CLAIMS EXPENSE ALLOWANCES may potentially apply. See Section VI.2. Note also that, under these facts, all CLAIMS against Attorneys A, B, and C are treated as having been first made in 2010, pursuant to Section IV.1.b.(2). This could result in available limits having been exhausted before a CLAIM is eventually made against a particular COVERED PARTY. The timing of making CLAIMS does not increase the available limits.*

*Example No. 3: Attorneys A and B represent husband and wife, respectively, in a divorce. Husband sues A for malpractice in litigating his prenuptial agreement. Wife sues B for not getting*

her proper custody rights over the children. A's and B's CLAIMS are not related. A's and B's CLAIMS would be related, but for the exception in the second sentence of Subsection 14.b above.

Example No. 4: An owner sells his company to its employees by selling shares to two employee benefit plans set up for that purpose. The plans and/or their members sue the company, its outside corporate counsel A, its ERISA lawyer B, the owner, his attorney C, and the plans' former attorney D, contending there were improprieties in the due diligence, the form of the agreements, and the amount and value of shares issued. The defendants file cross-claims. All CLAIMS are related. ~~F: they arise out of the same transactions or occurrences and therefore are related under Subsection 14.b. For the exception in Subsection 14.b to apply, all three elements must be satisfied. The exception does not apply because the claimants rely on common theories of liability. In addition, the exception may not apply because not all interests were adverse, theories of damages are common, or the attorneys did not act independently of one another. Finally, even if the exception in Subsection 14.b did apply, the CLAIMS would still be related under Subsection 14.d because they involve one loss. Although the CLAIMS are related, if all four attorneys' firms are sued, depending on the circumstances, up to four total CLAIMS EXPENSE ALLOWANCES might be available under Section VI.2.~~

Example No. 5: Attorney F represents an investment manager for multiple transactions over multiple years in which the manager purchased stocks in Company A on behalf of various groups of investors. Attorneys G and H represent different groups of investors. Attorney J represents Company A. Attorneys F, G, H, and J are all in different firms. They are all sued by the investors for securities violations arising out of this group of transactions. ~~Although the different acts by different lawyers at different times could legitimately be viewed as separate and unconnected, the claimant in this example attempts to tie them together as part of an alleged overall scheme or operation.~~ The CLAIMS are related because the claimants have made them so. See Subsection 14.c above. This will often be the case in securities CLAIMS. As long as such allegations remain in the case, only one limit will be available, even if alternative CLAIMS are also alleged. In this example, although there is only one Limit of Coverage available for all CLAIMS, depending on the circumstances, multiple CLAIMS EXPENSE ALLOWANCES might be available. See Section VI.2.

Example No. 6: Attorneys A, B, and C in the same firm represent a large number of asbestos clients over ten years' time, using a firm-wide formula for evaluating large numbers of cases with minimum effort. They are sued by certain clients for improper evaluation of their cases' values, although the plaintiffs do not allege a common scheme or plan. Because the firm in fact operated a firm-wide formula for handling the cases, the CLAIMS are related based on the COVERED PARTIES' own pattern or practice. The CLAIMS are related because the COVERED PARTIES' own conduct has made them so. See Subsection 14.d above. Attorneys A, B, and C will share one Limit of Coverage and one CLAIMS EXPENSE ALLOWANCE. LAW ENTITIES should protect themselves from such CLAIMS brought by multiple clients by purchasing adequate excess insurance.

Example No. 7: Attorney C represents a group of clients at trial and commits certain errors. Attorney D of the same firm undertakes the appeal, but fails to file the notice of appeal on time. Attorney E is hired by clients to sue Attorneys C and D for malpractice, but misses the statute of limitations. Clients sue all three attorneys. The CLAIMS are related and only a single Limit of Coverage applies to all CLAIMS. See Subsection 14.e above. When, as in this example, successive or collective errors each cause single or multiple clients and/or claimants harm or cumulatively enhance their damages or losses, then the CLAIMS are related. In such a situation, a claimant or group of claimants cannot increase the limits potentially available by alleging separate errors by

separate attorneys. Attorney E, however, may be entitled to a CLAIMS EXPENSE ALLOWANCE separate from the one shared by C and D.

*Example No. 8: Attorneys A, B, and C in the same firm represent a large banking institution. They are sued by the bank's customers in a class action lawsuit for their part in advising the bank on allegedly improper banking practices. All CLAIMS are related. No class action or purported class action can ever trigger more than one Limit of Coverage. See Subsection 14.f above.*

**15.** "SUIT" means a civil proceeding in which DAMAGES are alleged. "SUIT" includes an arbitration or alternative dispute resolution proceeding to which the COVERED PARTY submits with the consent of the PLF.

~~**16.** "YOU" and "YOUR" mean the PRO BONO PROGRAM shown in the Declarations.~~

**1716.** "PRO BONO PROGRAM" means the Pro Bono Program shown in the Declarations under the heading "PRO BONO PROGRAM."

**1817.** "VOLUNTEER ATTORNEY" means an attorney who meets all of the following conditions:

**a.** The attorney has provided volunteer pro bono legal services to clients without compensation through the PRO BONO PROGRAM;

**b.** At the time of providing the legal services referred to in Subsection a above, the attorney was not employed by the PRO BONO PROGRAM or compensated in any way by the PRO BONO PROGRAM;

~~**c. e.** At the time of providing the legal services referred to in Subsection a above, the attorney was eligible under Oregon State Bar Rules to volunteer for the certified PRO BONO PROGRAM; and~~

~~**d.** Not otherwise covered by a PLF Claims Made Plan.~~

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## SECTION II — WHO IS A COVERED PARTY

**1.** The following are COVERED PARTIES:

~~**a.** YOU~~ The PRO BONO PROGRAM.

**b.** Any current or former VOLUNTEER ATTORNEY, but only with respect to CLAIMS which arise out of a COVERED ACTIVITY.

**c.** In the event of death, adjudicated incapacity, or bankruptcy, the conservator, guardian, trustee in bankruptcy, or legal or personal representative of any COVERED PARTY listed in Subsection b, but only to the extent that such COVERED PARTY would otherwise be provided coverage under this Master Plan.

~~**d.** Any attorney or LAW ENTITY legally liable for YOUR COVERED ACTIVITIES, but only to the extent such legal liability arises from YOUR COVERED ACTIVITIES.~~



## COMMENTS

Please note that VOLUNTEER ATTORNEYS have coverage under this Master Plan only for CLAIMS which arise out of work performed for ~~YOU~~ the PRO BONO PROGRAM. For example, there is no coverage for CLAIMS which arise out of work performed for another organization or program, for a client outside of ~~YOUR program~~ the PRO BONO PROGRAM, or for a COVERED PARTY'S private practice, employment, or outside activities.

### SECTION III — WHAT IS A COVERED ACTIVITY

The following are COVERED ACTIVITIES, if the acts, errors, or omissions occur during the COVERAGE PERIOD; or prior to the COVERAGE PERIOD, if on the effective date of this Master Plan ~~YOU have~~ the PRO BONO PROGRAM has no knowledge that any CLAIM has been asserted arising out of such prior act, error, or omission, and there is no prior policy, PLF Claims Made Plan or Master Plan that provides coverage for such liability or CLAIM resulting from the act, error, or omission, whether or not the available limits of liability of such prior policy or Master Plan are sufficient to pay any liability or CLAIM:

#### ~~{VOLUNTEER ATTORNEY'S CONDUCT}~~

**1. Volunteer Attorney's Conduct.** Any act, error, or omission committed by a VOLUNTEER ATTORNEY which satisfies all of the following criteria:

**a.** The VOLUNTEER ATTORNEY committed the act, error, or omission in rendering professional services in the VOLUNTEER ATTORNEY'S capacity as an attorney, or in failing to render professional services that should have been rendered in the VOLUNTEER ATTORNEY'S capacity as an attorney.

**b.** At the time the VOLUNTEER ATTORNEY rendered or failed to render these professional services:

(1) The VOLUNTEER ATTORNEY was providing services to a client served by ~~YOUR program~~ the PRO BONO PROGRAM and was acting within the scope of duties assigned to the VOLUNTEER ATTORNEY by ~~YOU~~ the PRO BONO PROGRAM, and

(2) Such activity occurred after any Retroactive Date shown in the Declarations to this Master Plan.

#### ~~{CONDUCT OF OTHERS}~~

**2. Conduct of Others.** Any act, error or omission committed by a person for whom a VOLUNTEER ATTORNEY is legally liable in the VOLUNTEER ATTORNEY'S capacity as an attorney while providing legal services to clients through ~~YOU~~ the PRO BONO PROGRAM; provided each of the following criteria is satisfied:

- a. The act, error, or omission causing the VOLUNTEER ATTORNEY'S liability:
  - (1) Occurred while the VOLUNTEER ATTORNEY was providing services to a client served by YOU and was acting within the scope of duties assigned to the VOLUNTEER ATTORNEY by ~~YOU~~ the PRO BONO PROGRAM, and
  - (2) Occurred after any Retroactive Date shown in the Declarations to this Master Plan.
- b. The act, error, or omission, if committed by the VOLUNTEER ATTORNEY, would constitute a COVERED ACTIVITY under this Master Plan.

~~VOLUNTEER ATTORNEY'S CONDUCT IN A SPECIAL CAPACITY~~

3. **Volunteer Attorney's Conduct in a Special Capacity.** Any act, error, or omission committed by the VOLUNTEER ATTORNEY in the capacity of personal representative, administrator, conservator, executor, guardian, special representative pursuant to ORS 128.179, or trustee (except BUSINESS TRUSTEE); provided, at the time of the act, error, or omission, each of the following criteria was satisfied:

- a. The VOLUNTEER ATTORNEY was providing services to a client served by ~~YOU~~ the PRO BONO PROGRAM and was acting within the scope of duties assigned to the VOLUNTEER ATTORNEY by ~~YOU~~ the PRO BONO PROGRAM.
- b. Such activity occurred after any Retroactive Date shown in the Declarations to this Master Plan.

COMMENTS

*To qualify for coverage, a CLAIM must arise out of a COVERED ACTIVITY. The definition of COVERED ACTIVITY imposes a number of restrictions on coverage including the following:*

***Prior CLAIMS.** Section III limits the definition of COVERED ACTIVITY with respect to acts, errors, or omissions that happen prior to the COVERAGE PERIOD, so that no coverage is granted when there is prior knowledge or prior insurance. For illustration of the application of this language, see *Chamberlin v. Smith*, 140 Cal Rptr 493 (1977).*

~~*To the extent there is prior insurance or other coverage applicable to the CLAIM, it is reasonable to omit the extension of further coverage. Likewise, to the extent YOU or the VOLUNTEER ATTORNEY have knowledge that particular acts, errors, or omissions have given rise to a CLAIM, it is reasonable that that CLAIM and other CLAIMS arising out of such acts, errors, or omissions would not be covered. Such CLAIMS should instead be covered under the policy or Master Plan in force, if any, at the time the first such CLAIM was made.*~~

**VOLUNTEER ATTORNEY.** For a VOLUNTEER ATTORNEY'S actions to constitute a COVERED ACTIVITY, the VOLUNTEER ATTORNEY must have been performing work or providing services with the scope of activities assigned to the VOLUNTEER ATTORNEY by ~~YOU~~ the PRO BONO PROGRAM.

**Types of Activity.** COVERED ACTIVITIES have been divided into three categories. Subsection 1 deals with coverage for a VOLUNTEER ATTORNEY'S own conduct as an attorney. Subsection 2 deals with coverage for a VOLUNTEER ATTORNEY'S liability for the conduct of others. Subsection 3 deals with coverage for a VOLUNTEER ATTORNEY'S conduct in a special capacity (e.g. as a personal representative of an estate). The terms "BUSINESS TRUSTEE" and "VOLUNTEER ATTORNEY" as used in this section are defined at SECTION I – DEFINITIONS.

**Special Capacity.** Subsection 3 provides limited coverage for VOLUNTEER ATTORNEY acts as a personal representative, administrator, conservator, executor, guardian, or trustee. However, not all acts in a special capacity are covered under this Master Plan. Attorneys acting in a special capacity described in Subsection 3 of Section III may subject themselves to claims from third parties that are beyond the coverage provided by this Master Plan. For example, in acting as a conservator or personal representative, an attorney may engage in certain business activities, such as terminating an employee or signing a contract. If such actions result in a claim by the terminated employee or the other party to the contract, the estate or corpus should respond to such claims in the first instance, and should protect the attorney in the process. Attorneys engaged in these activities should obtain appropriate commercial general liability, errors and omissions, or other commercial coverage. The claim will not be covered under Subsection 3 of Section III.

The Master Plan ~~purposefully~~ uses the term "special capacity" rather than "fiduciary" in Subsection 3 to avoid any implication that this coverage includes fiduciary obligations other than those specifically identified. There is no coverage for VOLUNTEER ATTORNEY'S conduct under Subsection 3 unless VOLUNTEER ATTORNEY was formally named or designated as a personal representative, administrator, conservator, executor, guardian, or trustee (except BUSINESS TRUSTEE) and served in such capacity.

The term "BUSINESS TRUSTEE" is used in SECTION III.3 and in SECTION V.5. This covers the ordinary range of activities in which attorneys in the private practice of law are typically engaged. The Plan does not cover BUSINESS TRUSTEE activities as defined in this Subsection. Examples of types of BUSINESS TRUSTEE activities for which coverage is excluded under the Plan include, among other things: serving on the board of trustees of a charitable, educational, or religious institution; serving as the trustee for a real estate or other investment syndication; serving as trustee for the liquidation of any business or institution; and serving as trustee for the control of a union or other institution.

**Retroactive Date.** This section introduces the concept of a Retroactive Date. A PRO BONO PROGRAM may have a Retroactive Date in its Master Plan which may place an act, error, or omission outside the definition of a COVERED ACTIVITY, thereby eliminating coverage for any resulting CLAIM under the Master Plan for the PRO BONO PROGRAM and its VOLUNTEER ATTORNEYS. If a Retroactive Date applies to a CLAIM to place it outside the definition of a COVERED ACTIVITY herein, there will be no coverage for the CLAIM under this Master Plan as to any COVERED PARTY, even for vicarious liability.

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## SECTION IV – GRANT OF COVERAGE

### 1. Indemnity.

**a.** The PLF will pay those sums that a COVERED PARTY becomes legally obligated to pay as DAMAGES because of CLAIMS arising out of a COVERED ACTIVITY to which this Master Plan applies. No other obligation or liability to pay sums or perform acts or services is covered unless specifically provided for under Subsection 2 - Defense.

**b.** This Master Plan applies only to CLAIMS first made against a COVERED PARTY during the COVERAGE PERIOD.

**(1)** The applicable COVERAGE PERIOD for a CLAIM will be the earliest of:

**(a)** When a lawsuit is filed or an arbitration or ADR proceeding is formally initiated, or

**(b)** When notice of a CLAIM is received by any COVERED PARTY or by the PLF; or

**(c)** When the PLF first becomes aware of facts or circumstances that reasonably could be expected to be the basis of a CLAIM; or

**(d)** When a claimant intends to make a CLAIM but defers assertion of the CLAIM for the purpose of obtaining coverage under a later COVERAGE PERIOD and the COVERED PARTY knows or should know that the COVERED ACTIVITY that is the basis of the CLAIM could result in a CLAIM.

**(2)** Two or more CLAIMS that are SAME OR RELATED CLAIMS, whenever made, will all be deemed to have been first made at the time the earliest such CLAIM was first made. This provision will apply to ~~YOU~~ the PRO BONO PROGRAM only if ~~YOU have the PRO BONO PROGRAM has~~ coverage from any source applicable to the earliest such SAME OR RELATED CLAIM (whether or not the available limits of liability of such prior policy or plan are sufficient to pay any liability or claim.

**c.** This Master Plan applies only to SUITS brought in the United States, its territories or possessions, Canada, or the jurisdiction of any Indian Tribe in the United States. This Master Plan does not apply to SUITS brought in any other jurisdiction, or to SUITS brought to enforce a judgment rendered in any jurisdiction other than the United States, its territories or possessions, Canada, or the jurisdiction of any Indian Tribe in the United States.

**d.** The amount the PLF will pay for damages is limited as described in SECTION VI.

**e.** Coverage under this Master Plan is conditioned upon compliance with all requirements for Pro Bono Programs under PLF Policy 3.800 and all terms and conditions of this Master Plan.

## **2. Defense.**

**a.** Until the CLAIMS EXPENSE ALLOWANCE and the Limits of Coverage extended by this Master Plan are exhausted, the PLF will defend any SUIT against a COVERED PARTY seeking DAMAGES to which this coverage applies. The PLF has the sole right to investigate, repair, settle, designate defense attorneys, and otherwise conduct defense, repair, or prevention of

any CLAIM or potential CLAIM.

b. With respect to any CLAIM or potential CLAIM the PLF defends or repairs, the PLF will pay all reasonable and necessary CLAIMS EXPENSE ~~incurred~~~~the PLF may incur~~. All payments for EXCESS CLAIMS EXPENSE will reduce the Limits of Coverage.

c. If the CLAIMS EXPENSE ALLOWANCE and Limits of Coverage extended by this Master Plan are exhausted prior to the conclusion of any CLAIM, the PLF may withdraw from further defense of the CLAIM.

#### COMMENTS

**Claims Made Coverage.** *As claims made coverage, this Master Plan applies to CLAIMS first made during the time period shown in the Declarations. CLAIMS first made either prior to or subsequent to that time period are not covered by this Master Plan, although they may be covered by a prior or subsequent Master Plan.*

**Damages.** *This Master Plan grants coverage only for CLAIMS seeking DAMAGES. There is no coverage granted for other claims, actions, suits, or proceedings seeking equitable remedies such as restitution of funds or property, disgorgement, accountings or injunctions.*

**When Claim First Made to PLF.** ~~*Subsection 1.b(1) of this section is intended to make clear that the earliest of the several events listed determines when the CLAIM is first made.*~~ *Subsection 1.b(1)(c) adopts an objective, reasonable person standard to determine when the PLF's knowledge of facts or circumstances ~~can~~ rise to the level of a CLAIM for purpose of triggering an applicable COVERAGE PERIOD. This subsection is based solely on the objective nature of information received by the PLF. Covered Parties should thus be aware that any information or knowledge they may have that is not transmitted to the PLF is irrelevant to any determination made under this subsection.*

*If facts or circumstances meet the requirements of subsection 1.b(1)(c), then any subsequent CLAIM that constitutes a SAME OR RELATED CLAIM under Section I.14 will relate back to the COVERAGE PERIOD at the time the original notice of information was provided to the PLF.*

**SAME OR RELATED CLAIMS.** *Subsection 1.b(2) states a special rule applicable when several CLAIMS arise out of the SAME OR RELATED CLAIMS. Under this rule, all such SAME OR RELATED CLAIMS are considered first made at the time the earliest of the several SAME OR RELATED CLAIMS is first made. Thus, regardless of the number of claimants asserting SAME OR RELATED CLAIMS, the number of Master Plan Years involved, or the number of transactions giving rise to the CLAIMS, all such CLAIMS are treated as first made in the earliest applicable Master Plan Year and only one Limit of Coverage and one CLAIMS EXPENSE ALLOWANCE apply. There is an exception to the special rule in Subsection 1.b(2) for COVERED PARTIES who had no coverage (with the PLF or otherwise) at the time the initial CLAIM was made, but this exception does not create any additional Limits of Coverage. Pursuant to Subsection VI.2, only one Limit of Coverage would be available.*

**Scope of Duty to Defend.** *Subsection 2 defines the PLF's obligation to defend. The obligation to defend continues only until the CLAIMS EXPENSE ALLOWANCE and the Limits of Coverage are exhausted. In that event, the PLF will tender control of the defense to the COVERED PARTY or excess insurance carrier, if any. The PLF's payment of the CLAIMS EXPENSE ALLOWANCE and Limits of Coverage ends all of the PLF's duties.*

~~*Control of Defense.* Subsection 2.a allocates to the PLF control of the investigation, settlement, and defense of the CLAIM. See SECTION IX ASSISTANCE, COOPERATION AND DUTIES OF COVERED PARTY.~~

~~*Costs of Defense.* Subsection 2.b obligates the PLF to pay reasonable and necessary costs of defense. Only those expenses incurred by the PLF or with the PLF's authority are covered.~~

## SECTION V – EXCLUSIONS FROM COVERAGE

### ~~[WRONGFUL CONDUCT EXCLUSIONS]~~

1. **Fraudulent Claim Exclusion.** This Master Plan does not apply to a COVERED PARTY for any CLAIM in which that COVERED PARTY participates in a fraudulent or collusive CLAIM.

2. **Wrongful Conduct Exclusion.** This Master Plan does not apply to any of the following CLAIMS, regardless of whether any actual or alleged harm or damages were intended by a VOLUNTEER LAWYER:

(a) any CLAIM arising out of or in any way connected with YOURa VOLUNTEER LAWYER's actual or alleged criminal act or conduct;

(b) any CLAIM based on YOURa VOLUNTEER LAWYER's actual or alleged dishonest, knowingly wrongful, fraudulent or malicious act or conduct, or to any such act or conduct by another of which YOUthe VOLUNTEER LAWYER had personal knowledge and in which youthe VOLUNTEER LAWYER acquiesced or remained passive;

(c) any claim based on YOUR a VOLUNTEER LAWYER's intentional violation of the Oregon Rules of Professional Conduct (ORPC) or other applicable code of professional conduct, or to any such violation of such codes by another of which youthe VOLUNTEER LAWYER had personal knowledge and in which YOUthe VOLUNTEER LAWYER acquiesced or remained passive.

(d) This Plan does not apply to any CLAIM based on or arising out of YOURa VOLUNTEER LAWYER's non-payment of a valid and enforceable lien if actual notice of such lien was provided to YOUthe VOLUNTEER LAWYER, or to anyone employed in YOURthe VOLUNTEER LAWYER's office, prior to payment of the funds to a person or entity other than the rightful lien-holder.

~~This Master Plan does not apply to any CLAIM based on or arising out of any intentional, dishonest, fraudulent, criminal, malicious, knowingly wrongful, or knowingly unethical acts, errors, or omissions committed by YOU or at YOUR direction or in which YOU acquiesce or remain passive after having personal knowledge thereof;~~

### COMMENTS

*Exclusions 1 and 2 set out the circumstances in which wrongful conduct will eliminate coverage. An intent to harm is not required.*

**Voluntary Exposure to CLAIMS.** An attorney may sometimes voluntarily expose himself or herself to a CLAIM or known risk through a course of action or inaction when the attorney knows there is a more reasonable alternative means of resolving a problem. For example, an attorney might disburse settlement proceeds to a client even though the attorney knows of valid hospital, insurance company, or PIP liens, or other valid liens or claims to the funds. If the attorney disburses the proceeds to the client and a CLAIM arises from the other ~~claimant~~lien holder, Exclusion 2 will apply and the CLAIM will not be covered.

**Unethical Conduct.** If a CLAIM arises that involves unethical conduct by an attorney, Exclusion 2 may also apply. ~~to the conduct and the CLAIM would therefore not be covered. This can occur, f~~For example, if an attorney violates Disciplinary Rule ORPC 8.4(a)(3) (engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation) or ORPC 5.5(a) (aiding a nonlawyer in the unlawful practice of law) and a CLAIM results, Exclusion 2 will apply and the CLAIM will not be covered.

*Example: Attorney A allows a title company to use his name, letterhead, or forms in connection with a real estate transaction in which Attorney A has no significant involvement. Attorney A's activities violate ORPC 8.4(a)(3) and ORPC 5.5(a). A CLAIM is made against Attorney A in connection with the real estate transaction. Because Attorney A's activities fall within the terms of Exclusion 2, there will be no coverage for the CLAIM. In addition, the CLAIM likely would not even be within the terms of the coverage grant under this Plan because the activities giving rise to the CLAIM do not fall within the definition of a COVERED ACTIVITY. The same analysis would apply if Attorney A allowed an insurance or investment company to use his name, letterhead, or forms in connection with a living trust or investment transaction in which Attorney A has no significant involvement.*

**3. Disciplinary Proceedings Exclusion.** This Master Plan does not apply to any CLAIM based on or arising out of a proceeding brought against a COVERED PARTY by the Oregon State Bar or any similar entity.

**4. Punitive Damages and Cost Award Exclusions.** This Master Plan does not apply to:

- a. That part of any CLAIM seeking punitive, exemplary or statutorily enhanced damages; or
- b. Any CLAIM for or arising out of the imposition of attorney fees, costs, fines, penalties, or other sanctions imposed under any federal or state statute, administrative rule, court rule, or case law intended to penalize bad faith conduct, false or unwarranted certification in a pleading, ~~and~~ or the assertion of frivolous or bad faith claims or defenses. The PLF will defend the COVERED PARTY against such a CLAIM, but any liability for indemnity arising from such CLAIM will be excluded.

#### COMMENTS

A COVERED PARTY may become subject to punitive or exemplary damages, attorney fees, costs, fines, penalties, or other sanctions in two ways. The COVERED PARTY may have these damages assessed directly against the COVERED PARTY or the COVERED PARTY may have a client or other person sue the COVERED PARTY for indemnity for causing the client to be subjected to these damages.

Subsection a of Exclusion 4 applies to direct actions for punitive, exemplary or enhanced damages. It excludes coverage for that part of any CLAIM asserting such damages. In addition, such

CLAIMS do not involve covered DAMAGES as defined in this Master Plan. If ~~YOU are the~~ PRO BONO PROGRAM is sued for punitive damages, ~~YOU are the~~ PRO BONO PROGRAM is not covered for that exposure. Similarly, ~~YOU are the~~ PRO BONO PROGRAM is not covered to the extent compensatory damages are doubled, trebled or otherwise enhanced.

Subsection b of Exclusion 4 applies to both direct actions against a COVERED PARTY and actions for indemnity brought by others. ~~It excludes coverage for any monetary sanction arising from an~~ The courts have become increasingly intolerant of attorney's' improper conduct actions in several areas including trial practice, discovery, and conflicts of interest, such as is described in OCP 17 and FRCP11. Statutes, court rules, and common law approaches imposing various monetary sanctions have been developed to deter such inappropriate conduct. The purpose of these sanctions would be threatened if the PLF were to indemnify the guilty attorney and pay the cost of indemnification out of the assessments paid by all attorneys.

~~Thus, if~~ a COVERED PARTY causes the COVERED PARTY'S client to be subjected to a punitive damage award (based upon the client's wrongful conduct toward the claimant) because of a failure, for example, to assert a statute of limitations defense, the PLF will cover a COVERED PARTY'S liability for the punitive damages suffered by the client. Subsection a does not apply because the action is not a direct action for punitive damages and Subsection b does not apply because the punitive damages suffered by ~~YOUR~~ the VOLUNTEER LAWYER's client are not the type of damages described in Subsection b.

On the other hand, if a COVERED PARTY causes the COVERED PARTY'S client to be subjected to an award of attorney fees, costs, fines, penalties, or other sanctions imposed because of the COVERED PARTY'S conduct, or such an award is made against the COVERED PARTY, Subsection b applies and the CLAIM for such damages (or for any related consequential damages) will be excluded.

#### ~~[BUSINESS ACTIVITY EXCLUSIONS]~~

5. **Business Role Exclusion.** This Master Plan does not apply to that part of any CLAIM based on or arising out of a COVERED PARTY'S conduct as an officer, director, partner, BUSINESS TRUSTEE, employee, shareholder, member, or manager of any entity except a LAW ENTITY.

#### COMMENTS

A COVERED PARTY, in addition to his or her role as an attorney, may clothe himself or herself as an officer, director, partner, BUSINESS TRUSTEE, employee, shareholder, member, or manager of an entity. This exclusion eliminates coverage for the COVERED PARTY'S liability while acting in these capacities. However, the exclusion does not apply if the liability is based on such status in a LAW ENTITY.

6. **Business Ownership Interest Exclusion.** This Master Plan does not apply to any CLAIM ~~by or on behalf of~~ based on or arising out of any business enterprise:

a. In which a COVERED PARTY has an ownership interest, or in which a COVERED PARTY had an ownership interest at the time of the alleged acts, errors, or omissions on which the CLAIM is based;



- b. In which a COVERED PARTY is a general partner, managing member, or employee, or in which a COVERED PARTY was a general partner, managing member, or employee at the time of the alleged acts, errors, or omissions on which the CLAIM is based; or
- c. That is controlled, operated, or managed by a COVERED PARTY, either individually or in a fiduciary capacity, including the ownership, maintenance, or use of any property in connection therewith, or was so controlled, operated, or managed by a COVERED PARTY at the time of the alleged acts, errors, or omissions on which the CLAIM is based.

Ownership interest, for the purpose of this exclusion, does not include an ownership interest now or previously held by a COVERED PARTY solely as a passive investment, as long as a COVERED PARTY, those a COVERED PARTY controls, a COVERED PARTY'S spouse, parent, step-parent, child, step-child, sibling, or any member of a COVERED PARTY'S household, and those with whom a COVERED PARTY is regularly engaged in the practice of law, collectively now own or previously owned an interest of 10 percent or less in the business enterprise.

*COMMENTS*

~~Intimacy with a client can increase risk of loss in two ways: (1) The attorney's services may be rendered in a more casual and less thorough manner than if the services were extended at arm's length; and (2) After a loss, the attorney may feel particularly motivated to assure the client's recovery. While the PLF is cognizant of a natural desire of attorneys to serve those with whom they are closely connected, the PLF has determined that coverage for such services should be excluded. Exclusion 6 delineates the level of intimacy required to defeat coverage. See also Exclusion 11.~~

- 7. **Partner and Employee Exclusion.** This Master Plan does not apply to any CLAIM made by:
  - a. A COVERED PARTY'S present, former, or prospective partner, employer, or employee; or
  - b. A present, former, or prospective officer, director, or employee of a professional corporation in which ~~YOU are or were~~ a COVERED PARTY is or was a shareholder,

unless such CLAIM arises out of a COVERED PARTY'S conduct in an attorney-client capacity for one of the parties listed in Subsections a or b.<sup>[e1]</sup>

*COMMENTS*

*The PLF does not always cover a COVERED PARTY'S conduct in relation to the COVERED PARTY'S past, present, or prospective partners, employers, employees, and fellow shareholders, even if such conduct arises out of a COVERED ACTIVITY. Coverage is limited by this exclusion to a COVERED PARTY'S conduct in relation to such persons in situations in which the COVERED PARTY is acting as their attorney and they are the COVERED PARTY'S client.*

- 8. **ORPC 1.8 Exclusion.** This Master Plan does not apply to any CLAIM based on or arising out of any business transaction subject to ORPC 1.8(a) in which a COVERED PARTY participates with a client unless any required written disclosure has been properly executed in compliance with that rule in the form of Disclosure Form ORPC-1 (attached as Exhibit A to this Master Plan) and has been

~~properly fully~~ executed ~~by you and your~~ the COVERED PARTY's client [e2] prior to the occurrence ~~business transaction~~ giving rise to the CLAIM, ~~and either:~~

~~a. — A copy of the executed disclosure form is forwarded to the PLF within 10 calendar days of execution, or~~

~~b. — If delivery of a copy of the disclosure form to the PLF within 10 calendar days of execution would violate ORPC 1.6, ORS 9.460(3), or any other rule governing client confidences and secrets, the COVERED PARTY may instead send the PLF an alternative letter stating: (1) the name of the client with whom the COVERED PARTY is participating in a business transaction; (2) that the COVERED PARTY has provided the client with a disclosure letter pursuant to the requirements of ORPC 1.0(g) and 1.8(a); (3) the date of the disclosure letter; and (4) that providing the PLF with a copy of the disclosure letter at the present time would violate applicable rules governing client confidences and secrets. This alternative letter must be delivered to the PLF within 10 calendar days of execution of the disclosure letter.~~

### COMMENTS

~~**ORPC 1.** Form ORPC 1, referred to above, is attached to this Master Plan following SECTION XIV. The form includes an explanation of ORPC 1.8(a) which should be provided to the client involved in the business transaction.~~

~~—— **Applicability of Exclusion.** When an attorney engages in a business transaction with a client, the attorney has an ethical duty to make certain disclosures to the client. ORPC 1.0(g) and 1.8(a) provide:~~

#### ~~RULE 1.8 CONFLICT OF INTEREST: CURRENT CLIENTS: SPECIFIC RULES~~

~~(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to client unless:~~

~~—— (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;~~

~~—— (2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and~~

~~—— (3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.~~

#### ~~RULE 1.0(g)~~

~~(g) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct. When informed consent is required by these Rules to be confirmed in writing or to be given in a writing signed by the client, the lawyer shall give and the writing shall reflect a recommendation that the client seek independent legal advice to determine if consent should be given.~~

This exclusion is not intended to be an interpretation of ORPC 1.8(a). Instead, the Master Plan ~~is invoking~~invokes the body of law interpreting ORPC 1.8(a) to define when the exclusion is applicable.

~~**Use of the PLF's Form Not Mandated.** Because of the obvious conflict of interest and the high duty placed on attorneys, when the exclusion applies, the attorney is nearly always at risk of being liable when things go wrong. The only effective defense is to show that the attorney has made full disclosure, which includes a sufficient explanation to the client of the potential adverse impact of the differing interests of the parties to make the client's consent meaningful. Form ORPC 1 is the PLF's attempt to set out an effective disclosure which will provide an adequate defense to such CLAIMS. The PLF is sufficiently confident that this disclosure will be effective to agree that the exclusion will not apply if YOU use the PLF's proposed form. YOU are free to use YOUR own form in lieu of the PLF's form, but if YOU do so YOU proceed at YOUR own risk, i.e., if YOUR disclosure is less effective than the PLF's disclosure form, the exclusion will apply. Use of the PLF's form is not intended to assure YOU of compliance with the ethical requirements applicable to YOUR particular circumstances. It is YOUR responsibility to consult ORPC 1.0(g) and 1.8(a) and add any disclosures necessary to satisfy the disciplinary rules.~~

~~**Timing of Disclosure.** To be effective, it is important that the PLF can prove the disclosure was made prior to entering into the business transaction. Therefore, the disclosure should be reduced to writing and signed prior to entering into the transaction. There may be limited situations in which reducing the required disclosure to writing prior to entering into the transaction is impractical. In those circumstances, execution of the disclosure letter after entry into the transaction will not render the exclusion effective provided the execution takes place while the client still has an opportunity to withdraw from the transaction and the effectiveness of the disclosure is not compromised. Additional language may be necessary to render the disclosure effective in these circumstances.~~

~~**Delivery to the PLF.** Following execution of the disclosure letter, a copy of the letter or an alternative letter must be delivered to the PLF in a timely manner. Failure to do so will result in any subsequent CLAIM against YOU being excluded.~~

~~**Other Disclosures.** By its terms, ORPC 1.8(a) and this exclusion apply only to business transactions with a client in which the client expects the lawyer to exercise the lawyer's professional judgment therein for the protection of the client. However, lawyers frequently enter into business transactions with others not recognizing that the other expects the lawyer to exercise professional judgment for his or her protection. It can be the "client's" expectation and not the lawyer's recognition that triggers application of ORPC 1.8(a) and this exclusion.~~

**9. Investment Advice Exclusion.** This Master Plan does not apply to any CLAIM based on or arising out of any act, error, or omission committed by a COVERED PARTY (or by someone for whose conduct a COVERED PARTY is legally liable) while in the course of rendering INVESTMENT ADVICE if the INVESTMENT ADVICE is in fact either the sole cause or a contributing cause of any resulting damage. However, if all INVESTMENT ADVICE rendered by the COVERED PARTY constitutes a COVERED ACTIVITY described in SECTION III.3, this exclusion will not apply unless part or all of such INVESTMENT ADVICE is described in Subsections d, e, f. or g of the definition of INVESTMENT ADVICE in SECTION I.10.

#### COMMENTS

~~In prior years, the PLF suffered extreme losses as a result of COVERED PARTIES engaging in INVESTMENT ADVICE activity. It was never intended that the PLF cover such activities. An INVESTMENT ADVICE exclusion was added to the Claims Made Plan in 1984. Nevertheless, losses continued in situations where the COVERED PARTY had rendered both INVESTMENT ADVICE and legal advice. In addition, some CLAIMS resulted where the attorney provided INVESTMENT ADVICE in the guise of legal advice.~~

~~Exclusion 9, first introduced to the Claims Made Plan in 1987, represented a totally new approach to this problem. Instead of excluding all INVESTMENT ADVICE, the PLF Master Plan has clearly delineated delineates specific activities which-that will not be covered, whether or not legal as well as INVESTMENT ADVICE is involved. These specific activities are defined in Section I.10 under the definition of INVESTMENT ADVICE. The PLF's choice of delineated activities was guided by specific cases that exposed the PLF in situations never intended to be covered. The PLF is cognizant Master Plan takes into account that COVERED PARTIES doing structured settlements and COVERED PARTIES in business practice and tax practice legitimately engage in the rendering of general INVESTMENT ADVICE as a part of their practices. In delineating the activities to be excluded, the PLF Master Plan has attempted to retain coverage for these legitimate practices. For example, the last sentence of the exclusion permits coverage for certain activities normally undertaken by conservators and personal representatives (i.e., COVERED ACTIVITIES described in Section III.3) when acting in that capacity even though the same activities would not be covered if performed in any other capacity. See the definition of INVESTMENT ADVICE in Section I.~~

Exclusion 9 applies whether the COVERED PARTY is directly or vicariously liable for the INVESTMENT ADVICE.

~~Note that~~ Exclusion 9 could defeat coverage for an entire CLAIM even if only part of the CLAIM involved INVESTMENT ADVICE. If INVESTMENT ADVICE is in fact either the sole or a contributing cause of any resulting damage that is part of the CLAIM, the entire CLAIM is excluded.

#### ~~[PERSONAL RELATIONSHIP AND BENEFITS EXCLUSIONS]~~

**10. Law Practice Business Activities or Benefits Exclusion.** This Master Plan does not apply to any CLAIM:

- a. For any amounts paid, incurred or charged by any COVERED PARTY, as fees, costs, or disbursements, including but not limited to fees, costs and disbursements alleged to be excessive, not earned, or negligently incurred, whether claimed as restitution of specific funds, forfeiture, financial loss, set-off or otherwise.
- b. Arising from or relating to the negotiation, securing, or collection of fees, costs, or disbursements owed or claimed to be owed to a COVERED PARTY; or
- c. For damages or the recovery of funds or property that have or will directly or indirectly benefit any COVERED PARTY.
- d. In the event the PLF defends any claim or suit that includes any claim within the scope of this exclusion, it will have the right to settle or attempt to dismiss any other

claim(s) not falling within this exclusion, and to withdraw from the defense following the settlement or dismissal of any such claim(s).

This exclusion does not apply to any CLAIM based on an act, error or omission by the COVERED PARTY regarding the client's right or ability to recover fees, costs, or expenses from an opposing party, pursuant to statute or contract.

~~a. — For the return of any fees, costs, or disbursements paid to a COVERED PARTY (or paid to any other attorney or LAW ENTITY with which the COVERED PARTY was associated at the time the fees, costs, or disbursements were incurred or paid), including but not limited to fees, costs, and disbursements alleged to be excessive, not earned, or negligently incurred;~~

~~b. — Arising from or relating to the negotiation, securing, or collection of fees, costs, or disbursements owed or claimed to be owed to a COVERED PARTY or any LAW ENTITY with which the COVERED PARTY is now associated, or was associated at the time of the conduct giving rise to the CLAIM; or~~

~~e. — For damages or the recovery of funds or property that have or will directly or indirectly benefit any COVERED PARTY.~~

#### COMMENTS

~~This Master Plan is intended to cover liability for errors committed in rendering professional services. It is not intended to does not cover liabilities arising out of the business aspects of the practice of law. Here, the Master Plan clarifies this distinction by excluding liabilities arising out of fee disputes whether the CLAIM seeks a return of a paid fee, cost, or disbursement. Subsection c, in addition, excludes CLAIMS for damages or the recovery of funds or property that, for whatever reason, have resulted or will result in the accrual of a benefit to any COVERED PARTY.~~

Attorneys sometimes attempt to correct their own mistakes without notifying the PLF. In some cases, the attorneys charge their clients for the time spent in correcting their prior mistakes, which can lead to a later CLAIM from the client. The better course of action is to notify the PLF of a potential CLAIM as soon as it arises and allow the PLF to hire and pay for repair counsel if appropriate. In the PLF's experience, repair counsel is usually more successful in obtaining relief from a court or an opposing party than the attorney who made the mistake. In addition, under Subsection a of this exclusion, the PLF does not cover CLAIMS from a client for recovery of fees previously paid by the client to a COVERED PARTY (including fees charged by an attorney to correct the attorney's prior mistake).

Example No. 1: Attorney A sues Client for unpaid fees; Client counterclaims for the return of fees already paid to Attorney A which allegedly were excessive and negligently incurred by Attorney A. Under Subsection a, there is no coverage for the CLAIM.

Example No. 2: Attorney B allows a default to be taken against Client, and bills an additional \$2,500 in attorney fees incurred by Attorney B in his successful effort to get the default set aside. Client pays the bill, but later sues Attorney B to recover the fees paid. Under Subsection a there is no coverage for the CLAIM.

Example No. 3: Attorney C writes a demand letter to Client for unpaid fees, then files a lawsuit

for collection of the fees. Client counterclaims for unlawful debt collection. Under Subsection b., there is no coverage for the CLAIM. The same is true if Client is the plaintiff and sues for unlawful debt collection in response to the demand letter from Attorney C.

Example No. 4: Attorney D negotiates a fee and security agreement with Client on behalf of Attorney D's own firm. Other firm members, not Attorney D, represent Client. Attorney D later leaves the firm, Client disputes the fee and security agreement, and the firm sues Attorney D for negligence in representing the firm. Under Subsection b., there is no coverage for the CLAIM.

Example No. 5: Attorney E takes a security interest in stock belonging to Client as security for fees. Client fails to pay the fees and Attorney E executes on the stock and becomes the owner. Client sues for recovery of the stock and damages. Under Subsection c., there is no coverage for the CLAIM. The same is true if Attorney E receives the stock as a fee and later is sued for recovery of the stock or damages.

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**11. Family Member and Ownership Exclusion.** This Master Plan does not apply to: (a) any CLAIM based upon or arising out of a COVERED PARTY'S legal services performed by a COVERED PARTY on behalf of that COVERED PARTY'S spouse, parent, step-parent, child, step-child, sibling, or any member of that COVERED PARTY'S household, or on behalf of a business entity in which any of them, individually or collectively, have a controlling interest or (b) any CLAIM against a COVERED PARTY based on or arising out of another lawyer having provided legal services or representation to his or her own spouse, parent, child, step-child, sibling, or any member of his or her household, or on behalf of a business entity in which any of them individually or collectively, have a controlling interest.

#### COMMENTS

Work performed for family members is not covered under this Plan. A CLAIM based upon or arising out of such work, even for example a CLAIM against other lawyers or THE FIRM for failure to supervise, will be excluded from coverage. This exclusion does not apply, however, if one attorney performs legal services for another attorney's family member.

**12. Benefit Plan Fiduciary Exclusion.** This Master Plan does not apply to any CLAIM arising out of a COVERED PARTY'S activity as a fiduciary under any employee retirement, deferred benefit, or other similar Master Plan.

**13. Notary Exclusion.** This Master Plan does not apply to any CLAIM arising out of any witnessing of a signature or any acknowledgment, verification upon oath or affirmation, or other notarial act without the physical appearance before such witness or notary public, unless such CLAIM arises from the acts of a COVERED PARTY'S employee and the COVERED PARTY has no actual knowledge of such act.

~~**GOVERNMENT ACTIVITY EXCLUSION**~~

**14. Government Activity Exclusion.** This Master Plan does not apply to any CLAIM arising out of a COVERED PARTY'S conduct:

- a. As a public official or an employee of a governmental body, subdivision, or agency; or

b. In any other capacity that comes within the defense and indemnity requirements of ORS 30.285 and 30.287, or other similar state or federal statute, rule, or case law. If a public body rejects the defense and indemnity of such a CLAIM, the PLF will provide coverage for such COVERED ACTIVITY and will be subrogated to all of the COVERED PARTY'S rights against the public body.

COMMENTS

*Subsection a applies whether or not the public official or employee is entitled to defense or indemnity from the governmental entity. Subsection b, in addition, excludes coverage for COVERED PARTIES in other relationships with a governmental entity, but only if statute, rule, or case law entitles a COVERED PARTY to defense or indemnity from the governmental entity.*

~~HOUSE COUNSEL EXCLUSION~~

15. **House Counsel Exclusion.** This Master Plan does not apply to any CLAIM arising out of a COVERED PARTY'S conduct as an employee in an employer-employee relationship.

COMMENTS

*This exclusion applies to conduct as an employee even when the employee represents a third party in an attorney-client relationship as part of the employment. Examples of this application include employment by an insurance company, labor organization, member association, or governmental entity that involves representation of the rights of insureds, union or association members, clients of the employer, or the employer itself.*

~~GENERAL TORTIOUS CONDUCT EXCLUSIONS~~

16. **General Tortious Conduct Exclusions.** This Master Plan does not apply to any CLAIM against any COVERED PARTY for:

- a. Bodily injury, sickness, disease, or death of any person;
- b. Injury to, loss of, loss of use of, or destruction of any real, personal, or intangible property; or
- c. Mental anguish or emotional distress in connection with any CLAIM described under Subsections a or b.

This exclusion does not apply to any CLAIM made under ORS 419B.010 if the CLAIM arose from an otherwise COVERED ACTIVITY.

COMMENTS

~~*The CLAIMS excluded are not typical errors and omissions torts and were, therefore, considered inappropriate for coverage under the Master Plan. YOU are encouraged to seek coverage for these CLAIMS through commercial insurance markets.*~~

~~*Prior to 1991 the Claims Made Plan expressly excluded "personal injury" and "advertising*~~

~~injury," defining those terms in a manner similar to their definitions in standard commercial general liability policies. The deletion of these defined terms from this Exclusion is not intended to imply that all personal injury and advertising injury CLAIMS are covered. Instead, the deletion is intended only to permit coverage for personal injury or advertising injury CLAIMS, if any, that fall within the other coverage terms of the Master Plan.~~

Subsection b of this exclusion is intended to encompass a broad definition of property. For these purposes, property includes real, personal and intangible property (e.g. electronic data, financial instruments, money etc.) held by an attorney. However, Subsection b is not intended to apply to the extent the loss or damage of property materially and adversely affects an attorney's performance of professional services, in which event a CLAIM resulting from the loss or damage would not be excluded by Exclusion 16.

*Example No. 1: Client gives Attorney A valuable jewelry to hold for safekeeping. The jewelry is stolen or lost. There is no coverage for the value of the stolen or lost jewelry, since the loss of the property did not adversely affect the performance of professional services. Attorney A can obtain appropriate coverage for such losses from commercial insurance sources.*

*Example No. 2: Client gives Attorney B a defective ladder from which Client fell. The ladder is evidence in the personal injury case Attorney B is handling for Client. Attorney B loses the ladder. Because the ladder is lost, Client loses the personal injury case. The CLAIM for the loss of the personal injury case is covered. The damages are the difference in the outcome of the personal injury case caused by the loss of the ladder. There would be no coverage for the loss of the value of the ladder. Coverage for the value of the ladder can be obtained through commercial insurance sources.*

*Example No. 3: Client gives Attorney C important documents relevant to a legal matter being handled by Attorney C for Client. After conclusion of handling of the legal matter, the documents are lost or destroyed. Client makes a CLAIM for loss of the documents, reconstruction costs, and consequential damages due to future inability to use the documents. There is no coverage for this CLAIM, as loss of the documents did not adversely affect any professional services because the professional services had been completed. Again, coverage for loss of the property (documents) itself can be obtained through commercial general liability or other insurance or through a valuable papers endorsement to such coverage.*

~~**Child Abuse Reporting Statute.** This exclusion would ordinarily exclude coverage for the type of damages that might be alleged against an attorney for failure to comply with ORS 419B.010, the child abuse reporting statute. (It is presently uncertain whether civil liability can arise under the statute.) If there is otherwise coverage under this Master Plan for a CLAIM arising under ORS 419B.010, the PLF will not apply Exclusion 16 to the CLAIM.~~

**17. Unlawful Harassment and Discrimination Exclusion.** This Master Plan does not apply to any CLAIM based on or arising out of harassment or discrimination on the basis of race, creed, age, religion, sex, sexual preference orientation, disability, pregnancy, national origin, marital status, or any other basis prohibited by law.

#### COMMENTS

*The CLAIMS excluded are not typical errors-and-omissions torts and are, therefore, inappropriate for coverage not covered under the Master Plan.*



~~[PATENT EXCLUSION]~~

18. **Patent Exclusion.** This Master Plan does not apply to any CLAIM based upon or arising out of professional services rendered or any act, error, or omission committed in relation to the prosecution of a patent if ~~YOU were~~the VOLUNTEER LAWYER was not registered with the U.S. Patent and Trademark Office at the time the CLAIM arose.

19. *Reserved.*

~~[CONTRACTUAL OBLIGATION EXCLUSION]~~

20. **Contractual Obligation Exclusion.** This Master Plan does not apply to any CLAIM:

a. Based upon or arising out of any bond or any surety, guaranty, warranty, joint control, or similar agreement, or any assumed obligation to indemnify another, whether signed or otherwise agreed to by ~~YOU~~a COVERED PARTY or someone for whose conduct ~~YOU~~a COVERED PARTY ~~are~~is legally liable, unless the ~~—~~CLAIM arises out of a COVERED ACTIVITY described in SECTION III.3 and the person against whom the CLAIM is made signs the bond or agreement solely in that capacity;

b. Any costs connected to ORS 20.160 or similar statute or rule;

c. For liability based on an agreement or representation, if the Covered Party would not have been liable in the absence of the agreement or representation; or

d. Claims in contract based upon an alleged promise to obtain a certain outcome or result.

*COMMENTS*

*In the Plan, the PLF agrees to assume certain tort risks of Oregon attorneys for certain errors or omissions in the private practice of law; it does not assume the risk of making good on attorneys' contractual obligations. So, for example, an agreement to indemnify or guarantee an obligation will generally not be covered, except in the limited circumstances described in Subsection a. That subsection is discussed further below in this Comment.*

*Subsection b, while involving a statutory rather than contractual obligation, nevertheless expresses a similar concept, since under ORS 20.160 an attorney who represents a nonresident or foreign corporation plaintiff in essence agrees to guarantee payment of litigation costs not paid by his or her client.*

*Subsection c states the general rule that contractual liabilities are not covered under the PLF Plan. For example, an attorney who places an attorney fee provision in his or her retainer agreement voluntarily accepts the risk of making good on that contractual obligation. Because a client's attorney fees incurred in litigating a dispute with its attorney are not ordinarily damages recoverable in tort, they are not a risk the PLF agrees to assume. In addition, if a Covered Party agrees or represents that he or*

she will pay a claim, reduce fees, or the like, a claim based on a breach of that agreement or representation will not be covered under the Plan.

Subsection d involves a specific type of agreement or representation: an alleged promise to obtain a particular outcome or result. One example of this would be an attorney who promises to get a case reinstated or to obtain a particular favorable result at trial or in settlement. In that situation, the attorney can potentially be held liable for breach of contract or misrepresentation regardless of whether his or her conduct met the standard of care. That situation is to be distinguished from an attorney's liability in tort or under the third party beneficiary doctrine for failure to perform a particular task, such as naming a particular beneficiary in a will or filing and serving a complaint within the statute of limitations, where the liability, if any, is not based solely on a breach of the attorney's guarantee, promise or representation.

Attorneys sometimes act in one of the special capacities for which coverage is provided under Section III.3 (i.e., as a named personal representative, administrator, conservator, executor, guardian, or trustee except BUSINESS TRUSTEE). If the attorney is required to sign a bond or any surety, guaranty, warranty, joint control, or similar agreement while carrying out one of these special capacities, Exclusion 20.a does not apply, although b, c, or d of this Exclusion may be applicable.

On the other hand, when an attorney is acting in an ordinary capacity not within the provisions of Section III.3, Exclusion 20 does apply to any CLAIM based on or arising out of any bond or any surety, guaranty, warranty, joint control, indemnification, or similar agreement signed by the attorney or by someone for whom the attorney is legally liable. In these situations, attorneys should not sign such bonds or agreements. For example, if an attorney is acting as counsel to a personal representative and the personal representative is required to post a bond, the attorney should resist any attempt by the bonding company to require the attorney to co-sign as a surety for the personal representative or to enter into a joint control or similar agreement that requires the attorney to review, approve, or control expenditures by the personal representative. If the attorney signs such an agreement and a CLAIM is later made by the bonding company, the estate, or another party, Exclusion 20 applies and there will be no coverage for the CLAIM.

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~~[BANKRUPTCY TRUSTEE EXCLUSION]~~

**21. Bankruptcy Trustee Exclusion.** This Master Plan does not apply to any CLAIM arising out of ~~YOUR~~a COVERED PARTY's activity (or the activity of someone for whose conduct ~~you~~are a COVERED PARTY is legally liable) as a bankruptcy trustee.

**22. Confidential or Private Data Exclusion.** This Plan does not apply to any CLAIM arising out of or related to the loss, compromise or breach of or access to confidential or private information or data. If the PLF agrees to defend a SUIT that includes a CLAIM that falls within this exclusion, the PLF will not pay any CLAIMS EXPENSE relating to such CLAIM.

COMMENTS

There is a growing body of law directed at protecting confidential or private information from disclosure. The protected information or data may involve personal information such as credit card information, social security numbers, drivers licenses, or financial or medical information. They may also involve business-related information such as trade secrets or

intellectual property. Examples of loss, compromise, breach or access include but are not limited to electronically stored information or data being inadvertently disclosed or released by a COVERED PARTY; being compromised by the theft, loss or misplacement of a computer containing the data; being stolen or intentionally damaged; or being improperly accessed by a COVERED PARTY or someone acting on his or her behalf. However, such information or data need not be in electronic format, and a data breach caused through, for example, the improper safeguarding or disposal of paper records would also fall within this exclusion.

There may be many different costs incurred to respond to a data breach, including but not limited to notification costs, credit monitoring costs, forensic investigations, computer reprogramming, call center support and/or public relations. The PLF will not pay for any such costs, even if the PLF is otherwise providing a defense.

**223. Activities Outside Pro Bono Program Exclusion.** This Master Plan does not apply to any CLAIM against a COVERED PARTY arising from or related to work or services beyond the scope of activities assigned to the COVERED PARTY by the PRO BONO PROGRAM.

#### COMMENTS

Activities by a volunteer lawyer which are outside of the scope of activities assigned to the lawyer by the pro bono program for which the lawyer has volunteered do not constitute a COVERED ACTIVITY under this Master Plan and will also be excluded by this exclusion. The term “PRO BONO PROGRAM” as used in this exclusion is defined at SECTION I – DEFINITIONS.

The various exclusions which follow in this subsection were adopted from the PLF’s standard Coverage Plan. Many of the exclusions are, by their nature, unlikely to apply to a volunteer attorney working for a pro bono program. The fact that a type of activity is mentioned in these exclusions does not imply that such activity will be a COVERED ACTIVITY under this Master Plan.

#### ~~[CONFIDENTIAL OR PRIVATE DATA EXCLUSION]~~

~~23. — This Plan does not apply to any CLAIM arising out of or related to the loss, compromise or breach of or access to confidential or private information or data. If the PLF agrees to defend a SUIT that includes a CLAIM that falls within this exclusion, the PLF will not pay any CLAIMS EXPENSE relating to such CLAIM.~~

#### ~~COMMENTS~~

~~— There is a growing body of law directed at protecting confidential or private information from disclosure. The protected information or data may involve personal information such as credit card information, social security numbers, drivers licenses, or financial or medical information. They may also involve business-related information such as trade secrets or intellectual property. Examples of loss, compromise, breach or access include but are not limited to electronically stored information or data being inadvertently disclosed or released by a Covered Party; being compromised by the theft, loss or misplacement of a computer containing the data; being stolen or intentionally damaged; or being improperly accessed by a Covered Party or someone acting on his or her behalf. However, such information or data need not be in electronic format, and a data breach caused through, for example, the improper~~

~~safeguarding or disposal of paper records would also fall within this exclusion.~~

~~—————There may be many different costs incurred to respond to a data breach, including but not limited to notification costs, credit monitoring costs, forensic investigations, computer reprogramming, call center support and/or public relations. The PLF will not pay for any such costs, even if the PLF is otherwise providing a defense.~~

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## SECTION VI – LIMITS OF COVERAGE AND CLAIMS EXPENSE ALLOWANCE

### 1. Limits for This Master Plan

**a. Coverage Limits.** The PLF’s maximum liability under this Master Plan is \$300,000 DAMAGES and EXCESS CLAIMS EXPENSE for all CLAIMS first made during the COVERAGE PERIOD (and during any extended reporting period granted under SECTION XIV). The making of multiple CLAIMS or CLAIMS against more than one COVERED PARTY will not increase the PLF’s Limit of Coverage.

**b. Claims Expense Allowance Limits.** In addition to the Limit of Coverage stated in SECTION VI.1.a above, there is a single CLAIMS EXPENSE ALLOWANCE of \$50,000 for CLAIMS EXPENSE for all CLAIMS first made during the COVERAGE PERIOD (and during any extended reporting period granted under SECTION XIV). The making of multiple CLAIMS or CLAIMS against more than one COVERED PARTY will not increase the CLAIMS EXPENSE ALLOWANCE. In the event CLAIMS EXPENSE exceeds the CLAIMS EXPENSE ALLOWANCE, the Limit of Coverage will be reduced by the amount of EXCESS CLAIMS EXPENSE incurred. The CLAIMS EXPENSE ALLOWANCE is not available to pay DAMAGES or settlements.

**c. No Consequential Damages.** No person or entity may recover any damages for breach of any provision in this Master Plan except those specifically provided for in this Master Plan.

### 2. Limits Involving Same or Related Claims Under Multiple PLF Plans

If this Master Plan and one or more other Master Plans or Claims Made Plans issued by the PLF apply to the SAME OR RELATED CLAIMS, then regardless of the number of claimants, clients, COVERED PARTIES, PRO BONO PROGRAMS, or LAW ENTITIES involved, only one Limit of Coverage and one CLAIMS EXPENSE ALLOWANCE will apply. Notwithstanding the preceding sentence, if the SAME OR RELATED CLAIMS are brought against two or more separate LAW ENTITIES or PRO BONO PROGRAMS, each of which requests and is entitled to separate defense counsel, the PLF will make one CLAIMS EXPENSE ALLOWANCE available to each of the separate LAW ENTITIES or PRO BONO PROGRAMS requesting a separate allowance. For purposes of this provision, whether LAW ENTITIES or PRO BONO PROGRAMS are separate is determined as of the time of the COVERED ACTIVITIES that are alleged in the CLAIMS. No LAW ENTITY, PRO BONO PROGRAM, or group of LAW ENTITIES or PRO BONO PROGRAMS practicing together as a single firm, will be entitled to more than one CLAIMS EXPENSE ALLOWANCE under this provision. The CLAIMS EXPENSE ALLOWANCE granted

will be available solely for the defense of the LAW ENTITY or PRO BONO PROGRAM requesting it.

## COMMENTS

*The PLF Claims Made Plan is intended to provide a basic “floor” level of coverage for all Oregon attorneys engaged in the private practice of law whose principal offices are in Oregon. Likewise, the Pro Bono Master Plan is intended to provide basic limited coverage. Because of this, there is a general prohibition against the stacking of either Limits of Coverage or CLAIMS EXPENSE ALLOWANCES. Except for the provision involving CLAIMS EXPENSE ALLOWANCES under Subsection 2, only one Limit of Coverage and CLAIMS EXPENSE ALLOWANCE will ever be paid under any one Claims Made Plan or Pro Bono Master Plan issued to a COVERED PARTY in any one MASTER PLAN YEAR, regardless of the circumstances. Limits of Coverage or CLAIMS EXPENSE ALLOWANCES in multiple individual Claims Made Plans and Pro Bono Master Plans do not stack for any CLAIMS that are “related.” As the definition of SAME OR RELATED CLAIMS and its Comments and Examples demonstrate, the term “related” has a broad meaning when determining the number of Limits of Coverage and CLAIMS EXPENSE ALLOWANCES potentially available. This broad definition is designed to ensure the long-term economic viability of the PLF by protecting it from multiple limits exposures, ensuring fairness for all Oregon attorneys who are paying annual assessments, and keeping the overall coverage affordable.*

*The Plan grants a limited exception to the one-limit rule for SAME OR RELATED CLAIMS. When such CLAIMS are asserted against more than one separate LAW ENTITY, and one of the LAW ENTITIES is entitled to and requests a separate defense of the SUIT, then the Plan allows for a separate CLAIMS EXPENSE ALLOWANCE for that LAW ENTITY.*

*The Limits of Coverage apply to claims against more than one COVERED PARTY so that naming more than one VOLUNTEER ATTORNEY, the PRO BONO PROGRAM, or other COVERED PARTIES as defendants does not increase the amount available.*<sup>[e3]</sup>

~~*Effective January 1, 2005, the PLF has created a limited exception to the one limit rule for SAME OR RELATED CLAIMS. When such CLAIMS are asserted against more than one separate LAW ENTITY or PRO BONO PROGRAM, and one of the LAW ENTITIES or PRO BONO PROGRAMS is entitled to and requests a separate defense of the SUIT, then the PLF will allow a separate CLAIMS EXPENSE ALLOWANCE for that LAW ENTITY or PRO BONO PROGRAM.*~~

*The coverage provisions and limitations provided in this Master Plan are the absolute maximum amounts that can be recovered under the Master Plan. Therefore, no person or party is entitled to recover any consequential damages for breach of the Master Plan.*

*Example No. 1: Attorney A performed COVERED ACTIVITIES for a client while she was at two different law firms. Client sues A and both firms. Both firms request separate counsel, each one contending most of the alleged errors took place while A was at the other firm. The defendants are collectively entitled to a maximum of one \$300,000 Limit of Coverage and two CLAIMS EXPENSE ALLOWANCES. For purposes of this provision, Attorney A (or, if applicable, her professional corporation) is not a separate LAW ENTITY from the firm at which she worked. Accordingly, two, not three, CLAIMS EXPENSE ALLOWANCES are potentially available.*

*Example No. 2: Attorney A is a sole practitioner, practicing as an LLC, but also working of counsel for a partnership of B and C. While working of counsel, A undertook a case which he*

*concluded involved special issues requiring the expertise of Attorney D, from another firm. D and C work together in representing the client and commit errors in handling the case. Two CLAIMS EXPENSE ALLOWANCES are potentially available. There are only two separate firms – the BC partnership and D’s firm.*

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## **SECTION VII - NOTICE OF CLAIMS**

**1.** The COVERED PARTY must, as a condition precedent to the right of protection afforded by this coverage, give the PLF, at the address shown in the Declarations, as soon as practicable, written notice of any CLAIM made against the COVERED PARTY. In the event a SUIT is brought against the COVERED PARTY, the COVERED PARTY must immediately notify and deliver to the PLF, at the address shown in the Declarations, every demand, notice, summons, or other process received by the COVERED PARTY or the COVERED PARTY'S representatives.

**2.** If the COVERED PARTY becomes aware of facts or circumstances that reasonably could be expected to be the basis of a CLAIM for which coverage may be provided under this Master Plan, the COVERED PARTY must give written notice to the PLF as soon as practicable during the COVERAGE PERIOD of:

- a.** The specific act, error, or omission;
- b.** DAMAGES and any other injury that has resulted or may result; and
- c.** The circumstances by which the COVERED PARTY first became aware of such act, error, or omission.

**3.** If the PLF opens a suspense or claim file involving a CLAIM or potential CLAIM which otherwise would require notice from the COVERED PARTY under subsection 1. or 2. above, the COVERED PARTY'S obligations under those subsections will be considered satisfied for that CLAIM or potential CLAIM.

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## **SECTION VIII – COVERAGE DETERMINATIONS**

**1.** This Master Plan is governed by the laws of the state of Oregon, regardless of any conflict-of-law principle that would otherwise result in the laws of any other jurisdiction governing this Master Plan. Any disputes as to the applicability, interpretation, or enforceability of this Master Plan, or any other issue pertaining to the provision of benefits under this Master Plan, between any COVERED PARTY (or anyone claiming through a COVERED PARTY) and the PLF will be tried in the Multnomah County Circuit Court of the state of Oregon which will have exclusive jurisdiction and venue of such disputes at the trial level.

**2.** The PLF will not be obligated to provide any amounts in settlement, arbitration award, judgment, or indemnity until all applicable coverage issues have been finally determined by agreement or judgment.

**3.** In the event of exceptional circumstances in which the PLF, at the PLF's option, has paid a portion or all Limits of Coverage toward settlement of a CLAIM before all applicable coverage issues have been finally determined, then resolution of the coverage dispute as set forth in this Section will occur as soon as reasonably practicable following the PLF's payment. In the event it is determined that

this Master Plan is not applicable to the CLAIM, or only partially applicable, then judgment will be entered in Multnomah County Circuit Court in the PLF's favor and against the COVERED PARTY (and all others on whose behalf the PLF's payment was made) in the amount of any payment the PLF made on an uncovered portion of the CLAIM, plus interest at the rate applicable to judgments from the date of the PLF's payment. Nothing in this Section creates an obligation by the PLF to pay a portion or all of the PLF's Limits of Coverage before all applicable coverage issues have been fully determined.

4. The bankruptcy or insolvency of a COVERED PARTY does not relieve the PLF of its obligations under this Master Plan.

#### COMMENTS

~~Historically, Section VIII provided for resolution of coverage disputes by arbitration. After 25 years of resolving disputes in this manner, the PLF concluded it would be more beneficial to COVERED PARTIES and the PLF to try these matters to a court where appeals are available and precedent can be established.~~

~~In the event of a dispute over coverage, until the dispute over coverage is concluded, the PLF is not obligated to pay any amounts in dispute until the coverage dispute is concluded. The PLF recognizes there may occasionally be exceptional circumstances making a coverage determination impracticable prior to a payment by the PLF of a portion or all of the PLF's Limit of Coverage toward resolution of a CLAIM. For example, a claimant may make a settlement demand having a deadline for acceptance that would expire before coverage could be determined, or a court might determine on the facts before it that a binding determination on the relevant coverage issue should not be made while the CLAIM is pending. In some of these exceptional circumstances, the PLF may at its option pay a portion or all of the Limit of Coverage before the dispute concerning the question of whether this Master Plan is applicable to the CLAIM is decided. If the PLF pays a portion or all of the Limit of Coverage and the court subsequently determines that this Master Plan is not applicable to the CLAIM, then the COVERED PARTY or others on whose behalf the payment was made must reimburse the PLF, in order to prevent unjust enrichment and protect the solvency and financial integrity of the PLF. For a COVERED PARTY'S duties in this situation, see Section IX.3.~~

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#### SECTION IX - ASSISTANCE, COOPERATION, AND DUTIES OF COVERED PARTY

1. As a condition of coverage under this Master Plan, the COVERED PARTY will, without charge to the PLF, cooperate with the PLF and will:

- a. Provide to the PLF, within 30 days after written request, sworn statements providing full disclosure concerning any CLAIM or any aspect thereof;
- b. Attend and testify when requested by the PLF;
- c. Furnish to the PLF, within 30 days after written request, all files, records, papers, and documents that may relate to any CLAIM against the COVERED PARTY;
- d. Execute authorizations, documents, papers, loan receipts, releases, or waivers when so requested by the PLF;
- e. Submit to arbitration of any CLAIM when requested by the PLF;

**f.** Permit the PLF to cooperate and coordinate with any excess or umbrella insurance carrier as to the investigation, defense, and settlement of all CLAIMS;

**g.** Not communicate with any person other than the PLF or an insurer for the COVERED PARTY regarding any CLAIM that has been made against the COVERED PARTY, after notice to the COVERED PARTY of such CLAIM, without the PLF's written consent;

**h.** Assist, cooperate, and communicate with the PLF in any other way necessary to investigate, defend, repair, settle, or otherwise resolve any CLAIM against the COVERED PARTY.

**2.** To the extent the PLF makes any payment under this Plan, it will be subrogated to any COVERED PARTY's rights against third parties to recover all or part of these sums. When requested, every COVERED PARTY must assist the PLF in bringing any subrogation or similar claim. The PLF's subrogation or similar rights will not be asserted against any non-attorney employee of ~~YOURS or YOUR law firm~~ COVERED PARTY except for CLAIMS arising from intentional, dishonest, fraudulent, or malicious conduct of such person.

**3.** The COVERED PARTY may not, except at his or her own cost, voluntarily make any payment, assume any obligation, or incur any expense with respect to a CLAIM.

**4.** In the event the PLF proposes in writing a settlement to be funded by the PLF but subject to the COVERED PARTY's being obligated to reimburse the PLF if it is later determined that the Master Plan did not cover all or part of the CLAIM settled, the COVERED PARTY must advise the PLF in writing that the COVERED PARTY:

**a.** Agrees to the PLF's proposal, or

**b.** Objects to the PLF's proposal.

The written response must be made by the COVERED PARTY as soon as practicable and, in any event, must be received by the PLF no later than one business day (and at least 24 hours) before the expiration of any time-limited demand for settlement. A failure to respond, or a response that fails to unequivocally object to the PLF's written proposal, constitutes an agreement to the PLF's proposal. A response objecting to the settlement relieves the PLF of any duty to settle that might otherwise exist.

#### COMMENTS

*Subsection 4 addresses a problem that arises only when the determination of coverage prior to trial or settlement of the underlying claim is impracticable either because litigation of the coverage issue is not possible, permissible, or advisable, or because a pending trial date or time limit demand presents too short a period for resolution of the coverage issue prior to settlement or trial. In these circumstances, to avoid any argument that the PLF is acting as a volunteer, the PLF needs specific advice from the COVERED PARTY (or anyone claiming through the COVERED PARTY) either unequivocally agreeing that the PLF may proceed with the proposed settlement (i.e., waiving the volunteer argument) or unequivocally objecting to the proposed settlement (i.e., waiving any right to contend that the PLF has a duty to settle). ~~While the PLF recognizes the requirement of an unequivocal response in some circumstances forces the COVERED PARTY (or anyone claiming through the COVERED PARTY) to~~*



~~make a difficult judgment.~~ The exigencies of the situation require an unequivocal response so the PLF will know whether it can proceed with settlement without forfeiting its right to reimbursement to the extent the CLAIM is not covered.

~~The obligations of the Covered Party under Section IX as well as the other Sections of the Master Plan are to be performed without charge to the PLF.~~

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## SECTION X — ACTIONS BETWEEN THE PLF AND COVERED PARTIES

1. No legal action in connection with this Master Plan will be brought against the PLF unless the COVERED PARTY has fully complied with all terms of this Master Plan.
2. The PLF may bring legal action in connection with this Master Plan against a COVERED PARTY if:
  - a. The PLF pays a CLAIM under another Master Plan issued by the PLF;
  - b. A COVERED PARTY under this Master Plan is alleged to be liable for all or part of the damages paid by the PLF;
  - c. As between the COVERED PARTY under this Master Plan and the person or entity on whose behalf the PLF has paid the CLAIM, the latter has an alleged right to pursue the COVERED PARTY under this Master Plan for contribution, indemnity, or otherwise, for all or part of the damages paid; and
  - d. Such right can be alleged under a theory or theories for which no coverage is provided to the COVERED PARTY under this Master Plan.
3. In the circumstances outlined in Subsection 2, the PLF reserves the right to sue the COVERED PARTY, either in the PLF's name or in the name of the person or entity on whose behalf the PLF has paid, to recover such amounts as the PLF determines appropriate, up to the full amount the PLF has paid under one or more other Master Plans issued by the PLF. However, this Subsection will not entitle the PLF to sue the COVERED PARTY if the PLF's alleged rights against the COVERED PARTY are premised on a theory of recovery that would entitle the COVERED PARTY to indemnity under this Master Plan if the PLF's action were successful.

### COMMENTS

*Under certain circumstances, a CLAIM against a COVERED PARTY may not be covered because of an exclusion or other applicable provision. However, in some cases the PLF may be required to pay the CLAIM nonetheless because of the PLF's obligation to another COVERED PARTY under the terms of his or her Claims Made Plan or Pro Bono Master Plan.*

*Example No. 1: Attorney A misappropriates trust account funds belonging to Client X. Attorney A's partner, Attorney B, does not know of or acquiesce in Attorney A's wrongful conduct. Client X sues both Attorneys A and B. Attorney A has no coverage for the CLAIM under his Master Plan, but Attorney B has coverage for her liability under her Master Plan. The PLF pays the CLAIM under Attorney B's Master Plan. Section X.2 of Attorney A's Master Plan makes clear the PLF has the right to sue Attorney A for the damages the PLF paid under Attorney B's Master Plan.*

*Example No. 2: Same facts as the prior example, except that the PLF loans funds to Attorney B under terms that obligate Attorney B to repay the loan to the extent she recovers damages from Attorney A in an action for indemnity. Section X.2 of Attorney A's Master Plan makes clear that the PLF has the right pursuant to such arrangement with Attorney B to participate in her action against Attorney A.*

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## **SECTION XI - RELATION OF PRO BONO MASTER PLAN COVERAGE TO INSURANCE COVERAGE OR OTHER COVERAGE**

1. If the COVERED PARTY has valid and collectible insurance coverage or other obligation to indemnify that also applies to any loss or CLAIM covered by this Master Plan, the PLF will not be liable under the Master Plan until the limits of the COVERED PARTY'S insurance or other obligation to indemnify, including any applicable deductible, have been exhausted, unless such insurance or other obligation to indemnify is written only as specific excess coverage over the CLAIMS EXPENSE ALLOWANCE and Limits of Coverage of this Master Plan.
2. This Master Plan shall not apply to any CLAIM which is covered by any PLF Claims Made Plan which has been issued to any COVERED PARTY, regardless of whether or not the CLAIMS EXPENSE ALLOWANCE and the Limits of Coverage available to defend against or satisfy such CLAIM are sufficient to pay any liability or CLAIM or whether or not the underlying limits or terms of such PLF Claims Made Plan are different from this Master Plan.

### *COMMENTS*

*As explained in the Preface, ~~this~~ Master Plan is not an insurance policy. To the extent that insurance or other coverage exists, this Master Plan may not be invoked. This provision is designed to preclude the application of the other insurance law rules applicable under the Lamb-Weston v. Oregon Automobile Ins. Co. 219 Or 110, 341 P2d 110, 346 P2d 643 (1959).*

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## **SECTION XII – WAIVER AND ESTOPPEL**

Notice to or knowledge of the PLF's representative, agent, employee, or any other person will not effect a waiver, constitute an estoppel, or be the basis of any change in any part of this Master Plan nor will the terms of this Master Plan be waived or changed except by written endorsement issued and signed by the PLF's authorized representative.

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## **SECTION XIII — ASSIGNMENT**

The interest hereunder of any COVERED PARTY is not assignable.

## **SECTION XIV – TERMINATION**

This Master Plan will terminate immediately and automatically in the event ~~YOU are~~ [the PRO BONO PROGRAM](#) is no longer certified as an OSB Pro Bono Program by the Oregon State Bar.

~~Dear [Client]:~~

~~This letter confirms that we have discussed [specify the essential terms of the business transaction that you intend to enter into with your client and your role in the transaction. Be sure to inform the client whether you will be representing the client in the transaction. This is required by ORPC 1.8(a)(3)]. This letter also sets forth the conflict of interest that arises for me as your attorney because of this proposed business transaction.~~

~~The Oregon Rules of Professional Conduct prohibit an attorney from representing a client when the attorney's personal interests conflict with those of the client unless the client consents. Consequently, I can only act as your lawyer in this matter if you consent after being adequately informed. Rule 1.0(g) provides as follows:~~

~~(g) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct. When informed consent is required by these Rules to be confirmed in writing or to be given in a writing signed by the client, the lawyer shall give and the writing shall reflect a recommendation that the client seek independent legal advice to determine if consent should be given.~~

~~Although our interests presently appear to be consistent, my interests in this transaction could at some point be different than or adverse to yours. Specifically, [include an explanation which is sufficient to apprise the client of the potential adverse impact on the client of the matter to which the client is asked to consent, and any reasonable alternative courses of action, if applicable].~~

~~Please consider this situation carefully and decide whether or not you wish to enter into this transaction with me and to consent to my representation of you in this transaction. Rule 1.8(a)(2) requires me to recommend that you consult with another attorney in deciding whether or not your consent should be given. Another attorney could also identify and advise you further on other potential conflicts in our interests.~~

~~I enclose an article "Business Deals Can Cause Problems," which contains additional information. If you do decide to consent, please sign and date the enclosed extra copy of this letter in the space provided below and return it to me.~~

~~Very truly yours,~~

~~[Attorney Name and Signature]~~

~~I hereby consent to the legal representation, the terms of the business transaction, and the lawyer's role in transaction as set forth in this letter:~~

~~\_\_\_\_\_~~  
~~\_\_\_\_\_~~  
~~\_\_\_\_\_ [Client's Signature] \_\_\_\_\_ [Date]~~

~~Enclosure: "Business Deals Can Cause Problems," by Jeffrey D. Sapiro.~~

~~*BUSINESS DEALS CAN CAUSE PROBLEMS (Complying With ORPC 1.8(a))*~~

~~*By Jeffrey D. Sapiro, Disciplinary Counsel, Oregon State Bar*~~

~~Something that clients often lose sight of is that attorneys are not only legal advisors, but are business people as well. It is no secret that most practitioners wish to build a successful practice, rendering quality legal services to their clients, as a means of providing a comfortable living for themselves and/or their families. Given this objective, it is not surprising that many attorneys are attracted to business opportunities outside their practices that may prove to be financially rewarding. The fact that these business opportunities are often brought to an attorney's attention by a client or through involvement in a client's financial affairs is reason to explore the ethical problems that may arise.~~

~~ORPC 1.8(a) and 1.0(g) read as follows:~~

~~*Rule 1.8 Conflict of Interest: Current Clients: Specific Rules*~~

~~*(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:*~~

~~*(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;*~~

~~*(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and*~~

~~*(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.*~~

~~*ORPC 1.0 Terminology*~~

~~*(g) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and about the material risks of and reasonably available alternatives to the proposed course of conduct. When informed consent is required by these Rules to be confirmed in writing or to be given in a writing signed by the client, the lawyer shall give and the writing shall reflect a recommendation that the client seek independent legal advice to determine if consent should be given.*~~

~~The rationale behind this rule should be obvious. An attorney has a duty to exercise professional judgment solely for the benefit of a client, independent of any conflicting influences or loyalties. If an attorney is motivated by financial interests adverse to that of the client, the undivided loyalty due to the client may very well be compromised. (See also ORPC 1.7 and 1.8(c) and (i)) Full disclosure in writing gives the client the opportunity and necessary information to obtain independent legal advice when the~~

~~attorney's judgment may be affected by personal interest. Under ORPC 1.8(a) it is the client and not the attorney who should decide upon the seriousness of the potential conflict and whether or not to seek separate counsel.~~

~~A particularly dangerous situation is where the attorney not only engages in the business aspect of a transaction, but also furnishes the legal services necessary to put the deal together. In *In re Brown*, 277 Or 121, 559 P2d 884, rev. den. 277 Or 731, 561 P2d 1030 (1977), an attorney became partners with a friend of many years in a timber business, the attorney providing legal services and the friend providing the capital. The business later incorporated, with the attorney drafting all corporate documents, including a buy-sell agreement permitting the surviving stockholder to purchase the other party's stock. The Oregon Supreme Court found that the interests of the parties were adverse for a number of reasons, including the disparity in capital invested and the difference in the parties' ages, resulting in a potential benefit to the younger attorney under the buy-sell provisions. Despite the fact that the friend was an experienced businessman, the court held that the attorney violated the predecessor to ORPC 1.8(a), DR 5-104(A), because the friend was never advised to seek independent legal advice.~~

~~Subsequent to *Brown*, the Supreme Court has disciplined several lawyers for improper business transactions with clients. Among these cases are *In re Drake*, 292 Or 704, 642 P2d 296 (1982), which provides a comprehensive analysis of ORPC 1.8(a)'s predecessor, DR 5-104(A); *In re Montgomery*, 292 Or 796, 643 P2d 338 (1982), in which the fact that the client was a more sophisticated business person than the attorney did not affect the court's analysis; *In re Germundson*, 201 Or 656, 724 P2d 793 (1986), in which a close friendship between the attorney and the client was deemed insufficient reason to dispense with conflict disclosures; and *In re Griffith*, 304 Or 575, 748 P2d (1987), in which the court noted that, even if no conflict is present when a transaction is entered into, subsequent events may lead to a conflict requiring disclosures or withdrawal by the attorney.~~

~~Even in those situations where the attorney does not furnish legal services, problems may develop. There is a danger that, while the attorney may feel he or she is merely an investor in a business deal, the client may believe the attorney is using his or her legal skills to protect the client's interests in the venture. Indeed, this may be the very reason the client approached the attorney with a business proposition in the first place. When a lawyer borrows money from a client, there may even be a presumption that the client is relying on the lawyer for legal advice in the transaction. *In re Montgomery*, 292 Or 796, 643 P2d 338 (1982). To clarify for the client the role played by the attorney in a business transaction, ORPC 1.8(a)(3) now provides that a client's consent to the attorney's participation in the transaction is not effective unless the client signs a writing that describes, among other things, the attorney's role and whether the attorney is representing the client in the transaction.~~

~~In order to avoid the ethical problems addressed by the conflict-of-interest rules, the Supreme Court has said that an attorney must at least advise the client to seek independent legal counsel (*In re Bartlett*, 283 Or 487, 584 P2d 296 (1978)). This is now required by ORPC 1.8(a)(2). The attorney should disclose not only that a conflict of interest may exist, but should also explain the nature of the conflict "in such detail so that (the client) can understand the reasons why it may be desirable for each to have independent counsel. . ." (*In re Boivin*, 271 Or 419, 424, 533 P2d 171 (1975)). Risks incident to a transaction with a client must also be disclosed (ORPC 1.0(g); *In re Montgomery*, 297 Or 738, 687 P2d 157 (1984); *In re Whipple*, 296 Or 105, 673 P2d 172 (1983)). Such a disclosure will help ensure that there is no misunderstanding over the role the attorney is to play in the transaction and will help prevent the attorney from running afoul of the disciplinary rule discussed above.~~

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# OREGON STATE BAR

## Board of Governors Agenda

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**Meeting Date:** September 11, 2015  
**From:** MCLE Committee  
**Re:** Accreditation criteria for child and elder abuse reporting programs

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### Issue

Amend the MCLE Rules and Regulations to clarify the accreditation criteria for child and elder abuse reporting programs.

### Background

In order to assist program sponsors when planning programs, and members when attending programs, the Committee recommends amending the Regulations to MCLE Rule 5 to clarify what is required in order to qualify for child abuse or elder abuse reporting credit.

In 2012, the MCLE Committee instructed staff to strictly interpret Rule 3.2(b) regarding child abuse reporting credit. Per the Committee, in order to qualify for child abuse reporting credit, the program must include an Oregon attorney's requirements to report child abuse and the exceptions to those requirements. However, the rules and regulations were not amended to include this information.

After the elder abuse reporting requirement was approved by the Supreme Court, staff notified sponsors of this new requirement and provided the following information:

*In order to qualify for elder abuse reporting credit, the one hour program must include discussion of the reporting requirements for lawyers AND the exceptions to those requirements.*

The Committee believes that Rules 3.2(b) and 5.5(a) support this requirement because they require that 1) the program be on the lawyer's duty to report, and 2) the activity include a discussion of the applicable disciplinary rules which, in this case, is the confidentiality rule and how it interfaces with the exceptions to the duty to report. Nonetheless, staff recently had a program sponsor ask where the information above is set forth, as he did not see it in the MCLE Rules and Regulations, the statute, or the amendments to the statute.

Therefore, in order to clarify the meaning of the Rules, the Committee recommends amending the Regulations to MCLE Rule 5 to include the following:

Regulation 5.700 In order to be accredited as a child abuse reporting or elder abuse reporting activity, the one-hour session must include discussion of an Oregon attorney's requirements to report child abuse or elder abuse and the exceptions to those requirements.

# OREGON STATE BAR

## Board of Governors Agenda

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**Meeting Date:** September 11, 2015  
**From:** MCLE Committee  
**Re:** Proposed Rule Four and Regulations to Rule Four Amendments

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### Issue

In an effort to streamline the MCLE Rules and make the application accreditation process easier and more clearly defined, especially in light of the new association management software, the MCLE Committee recommends amending several rules and regulations regarding the accreditation procedure.

### Discussion

First, the Committee recommends eliminating the special category of “accredited sponsors.” There are currently over 6,000 sponsors listed in the MCLE program database. However, only 87 are listed as an accredited sponsor of Oregon CLE activities, including nine that have been added since 2009.

When the MCLE Rules were first approved in the late 1980s, staff believe a distinct differentiation was intended to be made between accredited sponsors and non-accredited sponsors. However, this is not really the case in everyday practice. Although Rule 4.2(a) says accredited sponsors are exempt from the accreditation application requirements, staff cannot update the program database without an application showing title, date, location, etc. of the activity. Therefore, both types must submit accreditation applications. They both must also pay the sponsor fee (same fee applies to both) and report attendance. To the staff’s knowledge, OSB has never had “blanket approval” for any sponsor; all accreditation applications are reviewed. Several well-known national providers of CLE activities, such as the American Law Institute and the American Immigration Lawyers Association, are not accredited sponsors of Oregon CLE activities, and OSB accredits hundreds of these programs each year.

The primary difference is that accredited sponsors have agreed to apply for Oregon CLE accreditation and report attendance for each of its activities an Oregon State Bar member attends. Members attending a program sponsored by a non-accredited sponsor may need to submit the accreditation application themselves if the sponsor does not submit one.

When the MCLE Rules were first implemented and there were only a small number of CLE sponsors, the accredited sponsor status made more sense as OSB members could easily choose to attend programs offered by accredited sponsors and know that the sponsor would handle the paperwork (accreditation application, attendance reporting). Today, however, offering CLE programs is a competitive business. Many non-accredited sponsors handle the

accreditation process the same as accredited sponsors. They could require the OSB member to submit the application, but it is a marketing strategy to advertise that the program has been accredited in certain states. Because members now have so many options when choosing how to spend their CLE dollars, many sponsors know that, accredited sponsor status or not, most members expect the sponsor to handle the paperwork.

Also, Regulation 7.150 requires that sponsors submit an attendance record for their accredited CLE activities so deleting the accredited sponsor status would have no impact on attendance reporting by sponsors.

Because there is no value to retaining the special category of accredited sponsors, the Committee recommends the following rule and regulation amendments be made to clarify that we accredit programs, not sponsors.

Second, the Committee recommends deleting Rule 4.6, which refers to reciprocal accreditation. Many jurisdictions have determined that if a program is approved for Oregon CLE accreditation, that jurisdiction will honor the accreditation. However, Oregon does not automatically recognize accreditation from any jurisdiction. All accreditation applications for CLE activities are reviewed and processed pursuant to our rules, regardless of whether they have been accredited elsewhere. As written, the rule adds nothing to that process.

Finally, the Committee recommends eliminating Regulation 4.300(a), which provides a 30 day window of time for applications to be reviewed and processed or returned for more information. This is an extremely tight deadline during the peak of the compliance cycle when staff is processing compliance reports and accreditation applications. There is a spike in teaching and program accreditation applications received during November and December because many members submit all their accreditation applications at the end of each year. While staff appreciates those members who submit their accreditation applications well before the reporting period ends, they are still required to process those applications within 30 days of receipt. Staff also receives accreditation applications from sponsors for programs that will be held up to six or more months after the applications were received in our office. These, too, must be processed within 30 days.

The Committee recommends deleting any reference to a time frame in which applications must be processed. All applications will continue to be processed in a timely manner. One of the MCLE Program Outcomes for 2015 is to assure prompt and accurate processing of accreditation applications with the measure being a high percentage of accreditation applications that are processed within 30 days of receipt. This will continue to be included in MCLE's Program Outcome/Measure in future years. However, during the peak of the compliance cycle, this change will allow staff to focus on accreditation applications submitted by members whose reporting periods end within a few weeks. These applications should take priority as these members need to know how many credits they are entitled to claim for a CLE activity. It will also allow staff to focus on processing applications from sponsors



for programs held in the last few weeks of the year. These, too, take priority because members are waiting for this information in order to determine if additional credits should be completed before the end of the year. In addition, this change will allow staff to spread out the workflow more evenly throughout the year and eliminate the need to hire temporary help during the peak of the compliance cycle.

#### **Rule Four Accreditation Procedure**

##### **4.1 In General.**

(a) In order to qualify as an accredited CLE activity, the activity must be given activity accreditation by the MCLE Administrator.

~~(1) CLE activities must be given activity accreditation by the MCLE Administrator, or~~

~~(2) Must be an activity that would qualify as an accredited CLE activity and that is presented or co-presented by an accredited sponsor, or~~

~~(3) Must be accredited pursuant to MCLE Rule 4.6 or pursuant to a reciprocity agreement to which the Oregon State Bar is a party. An accredited CLE activity may take place outside Oregon.~~

(b) The MCLE Administrator shall ~~periodically~~ electronically publish a list of ~~accredited sponsors and~~ accredited programs.

(c) All sponsors shall permit the MCLE Administrator or a member of the MCLE Committee to audit the sponsors' CLE activities without charge for purposes of monitoring compliance with MCLE requirements. Monitoring may include attending CLE activities, conducting surveys of participants and verifying attendance of registrants.

##### **4.2 Sponsor Accreditation.**

~~(a) Subject to the provisions of Rule 4.2(c), CLE activities presented by accredited sponsors are automatically accredited. Accredited sponsors are exempt from the activity accreditation application requirements in Rule 4.3(d).~~

~~(b) A sponsor wishing to qualify as an accredited sponsor shall submit an application to the MCLE Administrator containing the information required by these Rules. In determining whether to grant accreditation, the MCLE Administrator shall consider the sponsor's past and present ability and willingness to present CLE activities in compliance with the accreditation standards listed in these Rules.~~

~~(c) Accredited sponsors shall:~~

~~—— (1) Assign the number of credit hours to be allowed for participation in each of their CLE activities, in compliance with these Rules and any Regulations adopted by the BOG.~~

~~2) Pay to the bar the program sponsor fee required by MCLE Regulation 4.350 for each of its CLE activities, which must be paid prior to each CLE activity. An additional program sponsor fee is required prior to any repeat live presentation of a CLE activity.~~

~~(3) Submit reports and information that may be required by these Rules.~~

~~(4) Comply with all of the accreditation standards contained in these Rules.~~

~~(d) The MCLE Administrator may revoke the accredited status of any sponsor that fails to comply with the requirements and accreditation standards of these Rules and any Regulations adopted by the BOG. The MCLE Administrator shall give 28 days' notice of such revocation. Following the expiration of the notice period, that sponsor shall be required to apply for accreditation of each of its CLE activities as provided in Rule 4.3 of these Rules. Review of the MCLE Administrator's revocation shall be pursuant to Rule 8.1 and Regulation 8.100.~~

~~(e) The automatic accreditation given to CLE activities presented or co-presented by accredited sponsors applies only to activities that comply with the accreditation standards contained in these Rules and any Regulations adopted by the BOG.~~

#### **4.3- 2 Group Activity Accreditation.**

(a) CLE activities ~~not presented by accredited sponsors shall~~ will be considered for accreditation on a case-by-case basis and ~~shall~~ must satisfy the accreditation standards listed in these Rules for the particular type of activity for which accreditation is being requested.

(b) A sponsor or individual active member may apply for accreditation of a group CLE activity by filing a written application for accreditation with the MCLE Administrator. The application shall be made on the form required by the MCLE Administrator for the particular type of CLE activity for which accreditation is being requested and shall demonstrate compliance with the accreditation standards contained in these Rules.

(c) A written application for accreditation of a group CLE activity submitted by or on behalf of the sponsor of the CLE activity shall be accompanied by the program sponsor fee required by MCLE Regulation 4.3500. An additional program sponsor fee is required for a repeat live presentation of a group CLE activity.

(d) A written application for accreditation of a group CLE activity must be filed either before or no later than 30 days after the completion of the activity. An application received more than 30 days after the completion of the activity is subject to a late processing fee as provided in Regulation 4.3500.

(e) The MCLE Administrator may revoke the accreditation of an activity at any time if it determines that the accreditation standards were not met for the activity. Notice of revocation shall be sent to the sponsor of the activity.

(f) Accreditation of a group CLE activity obtained by a sponsor or an active member shall apply for all active members participating in the activity.

**4.4 Credit Hours.** Credit hours, ~~whether determined by an accredited sponsor or by the MCLE Administrator,~~ shall be assigned in multiples of one-quarter of an hour. The BOG shall adopt

regulations to assist sponsors in determining the appropriate number of credit hours to be assigned.

#### **4.5 Sponsor Advertising.**

(a) Only sponsors of accredited group CLE activities may include in their advertising the accredited status of the activity and the credit hours assigned.

(b) Specific language and other advertising requirements may be established in regulations adopted by the BOG.

#### **4.6 Reciprocal Accreditation.**

~~(a) Group CLE activities taking place outside of Oregon may be accredited in Oregon provided:~~

~~—— (1) The jurisdiction in which the activity takes place has a MCLE program and MCLE accreditation standards substantially similar to those established by these Rules; and~~

~~—— (2) The activity has been accredited by the body administering the MCLE program in the jurisdiction in which the activity takes place.~~

~~(b) For the purposes of accreditation in Oregon, the MCLE Administrator may assign a number of credits attributable to the activity taking place outside Oregon in an amount different from the original amount attributed to the activity by the jurisdiction in which the activity takes place.~~

### **Regulations to MCLE Rule 4 Accreditation Procedure**

#### **4.200 Sponsor Accreditation.**

~~(a) Any sponsor seeking accreditation as an accredited sponsor under the MCLE Rules shall submit an application to the MCLE Administrator containing the following information:~~

~~—— (i) Specific credentials of the sponsor as to overall qualifications as a provider, continuing legal education experience and the like; and~~

~~—— (ii) Date, time, place and program content of previously sponsored programs and/or proposed continuing legal education programs and their compliance with the accreditation standards in MCLE Rule 5.1.~~

~~(b) The MCLE Administrator shall consider the application for accreditation and shall notify the sponsor seeking accreditation within 21 days of the accreditation determination. Review procedures shall be pursuant to MCLE Rule 8.1 and Regulation 8.100.~~

#### **4.300 4.200 Group Activity Accreditation.**

~~(a) Applications for accreditation shall be deemed approved unless the MCLE Administrator, within 30 days after receipt of the application, sends a notice that the application is questioned or that additional time is required for approval. The applicant shall have 14 days to respond to the MCLE Administrator's questions. The applicant's response to a questioned application shall be reviewed by the MCLE Administrator and the applicant shall be notified of the decision no later than 21 days after submission of the response.~~

~~(b)~~(a) Review procedures shall be pursuant to MCLE Rule 8.1 and Regulation 8.100.

~~(c)~~ (b) The number of credit hours assigned to the activity shall be determined based upon the information provided by the applicant. The applicant shall be notified via email or regular mail of the number of credit hours assigned or if more information is needed in order to process the application.

#### **~~4.350~~ 4.300 Sponsor Fees.**

(a) A sponsor of a group CLE activity that is accredited for 4 or fewer credit hours shall pay a program sponsor fee of \$40.00. An additional program sponsor fee is required for every repeat live presentation of an accredited activity, but no additional fee is required for a video or audio replay of an accredited activity.

(b) A sponsor of a group CLE activity that is accredited for more than 4 credit hours shall pay a program sponsor fee of \$75. An additional program sponsor fee is required for every repeat live presentation of an accredited activity, but no additional fee is required for a video or audio replay of an accredited activity.

(c) Sponsors presenting a CLE activity as a series of presentations may pay one program fee of \$40.00 for all presentations offered within three consecutive calendar months, provided:

(i) The presentations do not exceed a total of three credit hours for the approved series; and

(ii) Any one presentation does not exceed one credit hour.

(d) A late processing fee of \$40 is due for accreditation applications that are received more than 30 days after the program date. This fee is in addition to the program sponsor fee and accreditation shall not be granted until the fee is received.

(e) All local bar associations in Oregon are exempt from payment of the MCLE program sponsor fees. However, if accreditation applications are received more than 30 days after the program date, the late processing fee set forth in MCLE Regulation 4.350(d) will apply.

#### **4.400 Credit Hours.**

(a) Credit hours shall be assigned to CLE activities in multiples of one-quarter of an hour or .25 credits and are rounded to the nearest one-quarter credit.

(b) Credit Exclusions. Only CLE activities that meet the accreditation standards stated in MCLE Rule 5 shall be included in computing total CLE credits. Credit exclusions include the following:

(1) Registration

(2) Non-substantive introductory remarks

(3) Breaks exceeding 15 minutes per three hours of instruction

(4) Business meetings

(5) Programs of less than 30 minutes in length

#### **4.500 Sponsor Advertising.**

(a) Advertisements by sponsors of accredited CLE activities shall not contain any false or misleading information.

(b) Information is false or misleading if it:

- (i) Contains a material misrepresentation of fact or law or omits a fact necessary to make the statement considered as a whole not materially misleading;
- (ii) Is intended or is reasonably likely to create an unjustified expectation as to the results to be achieved from participation in the CLE activity;
- (iii) Is intended or is reasonably likely to convey the impression that the sponsor or the CLE activity is endorsed by, or affiliated with, any court or other public body or office or organization when such is not the case.

(c) Advertisements may list the number of approved credit hours. If approval of accreditation is pending, the advertisement shall so state and may list the number of CLE credit hours for which application has been made.

(d) If a sponsor includes in its advertisement the number of credit hours that a member will receive for attending the program, the sponsor must have previously applied for and received MCLE accreditation for the number of hours being advertised.

If the recommendations listed above are approved by the Board of Governors and Supreme Court (if required), the following rules regarding terms and definitions will also need to be amended.

**1.2 Accreditation:** The formal process of accreditation of ~~sponsors or~~ activities by the MCLE Administrator.

~~**1.3 Accredited Sponsor:** A sponsor that has been accredited by the MCLE Administrator.~~

**1.5 Accredited CLE Activity:** An activity that provides legal or professional education to attorneys in accordance with MCLE Rule 5.

**FORMAL OPINION NO. 2005-4**  
**Conflicts of Interest, Current Clients:**  
**Advancement of Living Expenses, Bail,**  
**and Travel Expenses to Client**

**Facts:**

Lawyer *A* proposes to advance or guarantee Client *A*'s living expenses pending the outcome of litigation that Lawyer *A* is handling for Client *A*.

Lawyer *B* proposes to advance bail money to Client *B*, along with court-related costs, on the express understanding that Client *B* will remain liable to Lawyer therefor.

Lawyer *C* proposes to pay for Lawyer *C*'s own travel and investigation expenses incurred on Client *C*'s behalf from Lawyer *C*'s own funds.

**Questions:**

1. Is the proposed conduct of Lawyer *A* ethical?
2. Is the proposed conduct of Lawyer *B* ethical?
3. Is the proposed conduct of Lawyer *C* ethical?

**Conclusions:**

1. No.
2. Yes, qualified.
3. Yes.

**Discussion:**

All of the foregoing questions are governed by Oregon RPC 1.8(e):

A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that: (1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and (2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client. ~~While representing a client in connection with contemplated or pending litigation, a lawyer shall not advance or guarantee financial assistance to the lawyer's client, except that a lawyer may advance or guarantee the expenses of litigation, provided the client remains ultimately liable for such expenses to the extent of the client's ability to pay.~~

This rule must be read in concert with Oregon RPC 1.7(a)(2), which states that a lawyer “shall not” represent a client if

there is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

Under Oregon RPC 1.7(a)(2), Lawyer *A*’s proposed conduct is unethical. *See In re Brown*, 298 Or 285, 692 P2d 107 (1984). By advancing these expenses, Lawyer *A* would be acquiring an interest in the litigation.

On the other hand, bail appears to be close enough to court-related costs to constitute “expenses of litigation,” which a lawyer may properly advance as long as the client remains liable therefor. Consequently, Lawyer *B*’s proposed conduct does not per se violate Oregon RPC 1.7(a)(2). Nevertheless, advancing significant bail funds, especially in the absence of a strong personal or familial relationship, could result in a personal conflict of interest between lawyer and client pursuant to Oregon RPC 1.7(a)(2). If so, Lawyer *B* could not advance bail funds without, at a minimum, satisfying himself or herself that the requirements of Oregon RPC 1.7(b) could be met and obtaining the necessary conflicts waiver. *See* ABA Formal Op No 04-432.

Lawyer *C*’s conduct is permissible. Indeed, such an assumption of investigative expenses is commonplace in contingent fee litigation.

~~Approved by Board of Governors, August 2005.~~

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COMMENT: For additional information on this general topic and other related topics, see THE ETHICAL OREGON LAWYER §§3.42–3.44 and chapter 8 (Oregon CLE 2003); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §36 (2003); and ABA Model Rules 1.7(b), 1.8(e).

## FORMAL OPINION NO. 2005-70

### Lawyer Changing Firms: Duty of Loyalty

#### Facts:

Lawyer is an associate or partner at Firm A. Lawyer is considering leaving Firm A and going to Firm B.

#### Questions:

1. Before Lawyer ~~leaves~~notifies Firm A, may Lawyer inform clients for whom Lawyer does work at Firm A of Lawyer's intention to go to Firm B?
2. If Lawyer leaves Firm A and joins Firm B, may Lawyer take the files of clients for whom Lawyer has done or is doing work?
3. After Lawyer leaves, may Lawyer personally contact clients for whom Lawyer did work while at Firm A to solicit their business for Firm B?

#### Conclusions:

1. See discussion.
2. Yes, qualified.
3. Yes, qualified.

#### Discussion:

1. *Contact with Clients While Still at Firm A.*

The primary duty of all lawyers is the fiduciary duty that lawyers owe to their clients. *Cf.* OSB Formal Ethics Op No 2005-26. Depending on the nature and status of Lawyer's work, this duty may well mean that advance notification is necessary to permit the clients to decide whether they wish to stay with Firm A, to go with Lawyer to Firm B, or to pursue some other alternative.

~~On the other hand, Lawyer also~~However, Lawyer's fiduciary duty to Firm A may require Lawyer to give notice to Firm A of Lawyer's intent to change firms prior to contacting clients of Firm A. See Penn Ethics Op 2007-300 (noting a departing lawyer may have a duty to notify old firm prior to substantive discussion about association with another firm). As this duty depends on specific facts, we cannot say whether the duty of advance notice exists here.<sup>1</sup>

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<sup>1</sup> For example, while Lawyer would generally notify Firm A before contacting clients, Lawyer might not notify Firm A if Lawyer believes Firm A will engage in obstructive conduct preventing Lawyer from contacting clients or transitioning to Firm B. If Lawyer is able to notify Firm A in advance, Lawyer and Firm A may send a joint notice to clients to permit clients to decide how to continue their representation. Some states require joint notification to clients from both old firm and departing lawyer. See Virginia Rule 5.8; Florida Rule 4-5.8. We do not express an opinion about whether joint notification is required in Oregon.



Lawyer owes duties to Firm A, Lawyer's current firm, arising out of the contractual, fiduciary, or agency relationship between Lawyer and Firm A. This contractual, fiduciary, or agency duty may be violated if, while still being compensated by Firm A, Lawyer endeavors to take clients away from Firm A. Cf. OSB Formal Ethics Op No 2005-60; ABA Formal Ethics Op No 99-414 (1999); *Joseph D. Shein, P.C. v. Myers*, 576 A2d 985 (Pa 1990); *Adler, Barish, Daniels, Levin v. Epstein*, 393 A2d 1175, 1182–1186 (Pa 1978).<sup>2</sup> If Lawyer's conduct would, under the circumstances, amount to "conduct involving dishonesty, fraud, deceit or misrepresentation that reflects adversely on the lawyer's fitness to practice law" in violation of Oregon RPC 8.4(a)(3), Lawyer would be subject to discipline. Absent specific facts, we cannot say whether that would be the case here.

Regardless of the contractual, fiduciary, or agency relationship between Lawyer and Firm A, however, it is clear under Oregon RPC 8.4(3) that Lawyer may not misrepresent Lawyer's status or intentions to others at Firm A. See *In re Smith*, 315 Or 260, 843 P2d 449 (1992); *In re Murdock*, 328 Or 18, 968 P2d 1270 (1998) (although not expressly written, implicit in disciplinary rules and in duty of loyalty arising from lawyer's contractual or agency relationship with his or her law firm is duty of candor toward that law firm). Cf. *In re Hiller*, 298 Or 526, 694 P2d 540 (1985); *In re Houchin*, 290 Or 433, 622 P2d 723 (1981).

## 2. *Control over Client Files and Property.*

Oregon RPC 1.15-1(a), (d), and (e) provide, in pertinent part:

(a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession separate from the lawyer's own property. Funds, including advances for costs and expenses and escrow and other funds held for another, shall be kept in a separate "Lawyer Trust Account" maintained in the state where the lawyer's office is situated, ~~or elsewhere with the consent of the client or third person.~~ Each lawyer trust account shall be an interest bearing account in a financial institution selected by the lawyer or law firm in the exercise of reasonable care. Lawyer trust accounts shall conform to ~~Rule 1.15-2~~ the rules in the jurisdictions in which the accounts are maintained. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation.

....

(d) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall

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<sup>2</sup> Lawyer and Firm A should be aware of their ethical obligations under Oregon RPC 5.6 (prohibiting restrictions on right to practice) and 1.16(d) (lawyer shall take reasonably practicable steps to protect client upon terminating representation). For example, Lawyer and Firm A should not engage in behavior that prejudices client during transfer from Firm A to Firm B.

promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

(e) When in the course of representation a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claim interests, the property shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute.

Pursuant to these sections, and assuming that Firm A does not have a valid and enforceable lien on any client property for unpaid fees, Firm A must promptly surrender client property to Lawyer, if the clients so request. Cf. ~~OSB Formal Ethics Op Nos 2005-60, 2005-90, 2005-125~~. OSB Formal Ethics Op Nos 2005-60, 2005-90, 2005-125.<sup>3</sup>

With respect to any portion of the file that does not constitute client property, it is necessary to consider Oregon RPC 1.16(d):

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers, personal property and money of the client to the extent permitted by other law.

As a practical matter, and assuming again that Firm A does not have a valid and enforceable lien, the only way to "protect a client's interests" would be to turn over all parts of the file that a client might reasonably need. See OSB Formal Ethics ~~Op No 2005-125~~, Op No 2005-125, regarding payment for photocopy costs and the identification of certain documents that may need to be provided to a client who requests them.

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<sup>3</sup> As noted in OSB Formal Ethics ~~Op No 2005-60~~, Op No 2005-60, Firm A may not insist that clients physically pick up their files in person if Firm A receives written directions from the clients to send the files elsewhere. In the period of time before receiving a client's decision about who will handle a matter, neither Firm A nor Lawyer should deny each other access to information about a client or a matter that is necessary to protect a client's interests. Cf. Oregon RPC 1.1 (lawyer shall provide competent representation to client; competent representation requires legal knowledge, skill, thoroughness, and preparation reasonably necessary for representation); Oregon RPC 1.3 (lawyer shall not neglect legal matter entrusted to lawyer).

3. *Solicitation of Former Clients.*

~~Lawyers are~~ The Rules of Professional Responsibility generally not ~~prohibited~~prohibit Lawyer from soliciting the clients of other lawyers.<sup>4</sup> Although in-person or telephone solicitation is generally prohibited by Oregon RPC 7.3(a),<sup>5</sup> Oregon RPC 7.3(a)(2) contains an exception for former clients, subject to the limitations in Oregon RPC 7.3(b)(3).<sup>6</sup> Clients for whom Lawyer worked while at Firm A are Lawyer's former clients. Lawyer also may solicit the former clients in writing if the requirements of Oregon RPC 7.1~~(a)-(e)~~<sup>7</sup> and 7.3 are met.

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<sup>4</sup> Lawyer may have fiduciary obligations to Firm A that may affect Lawyer's ability to solicit clients at certain times. See also RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 9 (2003).

<sup>5</sup> Oregon RPC 7.3~~(a)~~ (ba) provides:

~~(a)~~ (ba) A lawyer shall not by in-person, live telephone or real-time electronic contact solicit professional employment when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain, unless the person contacted:

(1) is a lawyer; or

~~(2)~~ (2) has a family, close personal, or prior professional relationship with the lawyer.

<sup>6</sup> Oregon RPC 7.3(b) provides:

~~(b)~~ A lawyer shall not solicit professional employment from a prospective client by written, recorded or electronic communication or by in-person, telephone or real-time electronic contact even when not otherwise prohibited by paragraph (a), if

(1) the lawyer knows or reasonably should know that the physical, emotional or mental state of the prospective client is such that the person could not exercise reasonable judgment in employing a lawyer;

(2) the prospective client has made known to the lawyer a desire not to be solicited by the lawyer; or

(3) the solicitation involves coercion, duress or harassment.

<sup>7</sup> Oregon RPC 7.1 provides:

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.

COMMENT: For additional information on this general topic and other related subjects, see THE ETHICAL OREGON LAWYER §§7.2, 7.6, 7.39, 11.14–11.15, 12.22, 12.28–12.30 (Oregon CLE 20032006); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§ 9(3), 16, 33, 43–46 (2003); and ABA Model Rules 1.1, 1.3, 1.15–1.16(d), 7.3(a)–(b), 8.4(c). See also Washington Informal Ethics Advisory Op No 1702 (unpublished).

~~Approved by Board of Governors, August 2005.~~

**FORMAL OPINION NO. 2005-101**

**Unauthorized Practice of Law:  
Lawyer as Mediator, Trade Names,  
Division of Fees with Nonlawyer**

**Facts:**

Lawyer and Psychologist would like to form a domestic relations mediation service under the assumed business name of "Family Mediation Center."

**Questions:**

1. May Lawyer act as mediator?
2. May Lawyer join with Psychologist to establish a mediation practice?
3. May they use the trade name "Family Mediation Center"?
4. What limitations, if any, exist on the potential allocation of work between Lawyer and Psychologist and on the allocation of fees or profits relating thereto?

**Conclusions:**

1. Yes.
2. Yes, qualified.
3. Yes, qualified.
4. See discussion.

**Discussion:**

1. *Lawyers as Mediators.*

Oregon RPC 2.4 provides:

- (a) A lawyer serving as a mediator:
  - \_\_\_\_\_ (1) shall not act as a lawyer for any party against another party in the matter in mediation or in any related proceeding; and
  - \_\_\_\_\_ (2) must clearly inform the parties of and obtain the parties' consent to the lawyer's role as mediator.
- (b) A lawyer serving as mediator:
  - \_\_\_\_\_ (1) may prepare documents that memorialize and implement the agreement reached in mediation;
  - \_\_\_\_\_ (2) shall recommend that each party seek independent legal advice before executing the documents; and
  - \_\_\_\_\_ (3) with the consent of all parties, may record or may file the documents in court.
- ~~(c) — Notwithstanding Rule 1.10, when a lawyer is serving or has served as a mediator in a matter, a member of the lawyer's firm may accept or continue the~~

~~representation of a party in the matter in mediation or in a related matter if all parties to the mediation give informed consent, confirmed in writing.~~

\_\_\_\_\_(d) The requirements of Rule 2.4(a)(2) and (b)(2) shall not apply to mediation programs established by operation of law or court order.

Pursuant to Oregon RPC 2.4, an Oregon lawyer who acts as mediator does not represent any of the parties to the mediation. This is why, among other things, the multiple-client conflict-of-interest rules set forth in Oregon RPC 1.7 do not apply. *Cf.* OSB Formal Ethics Op Nos 2005-94, 2005-46.

As long as Lawyer's conduct is consistent with Oregon RPC 2.4, Lawyer may act as mediator. For example, Lawyer could not, in light of Oregon RPC 2.4(b), draft a settlement agreement on behalf of divorcing spouses and then endeavor to file the parties' settlement agreement of record with the court without first obtaining the consent of the parties.

## 2. *Joining with a Nonlawyer to Provide Mediation Services.*

Oregon RPC 5.4 provides:

(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that;

\_\_\_\_\_(1) an agreement by a lawyer with the lawyer's firm or firm members may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons.

\_\_\_\_\_(2) a lawyer who purchases the practice of a deceased, disabled, or disappeared lawyer may, pursuant to the provisions of Rule 1.17, pay to the estate or other representative of that lawyer the agreed-upon purchase price.

\_\_\_\_\_(3) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement.

\_\_\_\_\_(4) a lawyer may share court-awarded legal fees with a nonprofit organization that employed, retained or recommended employment of the lawyer in the matter; and

(5) a lawyer may pay the usual charges of a bar-sponsored or operated not-for-profit lawyer referral service, including fees calculated as a percentage of legal fees received by the lawyer from the referral.-

(b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.

(c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

(d) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:

\_\_\_\_\_(1) a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;

\_\_\_\_\_ (2) a nonlawyer is a corporate director or officer thereof or occupies the position of similar responsibility in any form of association other than a corporation, except as authorized by law; or

\_\_\_\_\_ (3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.

(e) A lawyer shall not refer a client to a nonlawyer with the understanding that the lawyer will receive a fee, commission or anything of value in exchange for the referral, but a lawyer may accept gifts in the ordinary course of social or business hospitality.

Nonlawyers can and do lawfully act as mediators. In addition, lawyers are at liberty to engage in businesses other than the practice of law. *Cf.* OSB Formal Ethics Op No 2005-10. If the mediation service to be formed by Lawyer and Psychologist does not involve the practice of law, there is no reason Lawyer and Psychologist cannot join together to provide mediation services. Moreover, if the practice of law is not involved, the Oregon RPCs do not govern the nature of the business entity created by Lawyer and Psychologist (e.g., as a partnership, as a jointly owned corporation, or in an employer-employee relationship).

The practice of law involves, among other things, the application of a general body of legal knowledge to the problems of a specific entity or person. Drafting settlement agreements for others constitutes the practice of law. *Cf. In re Jones*, 308 Or 306, 779 P2d 1016 (1989); *Oregon State Bar v. Security Escrows, Inc.*, 233 Or 80, 377 P2d 334 (1962). See also OSB Formal Ethics Op Nos 2005-87 and 2005-20, and sources cited; *Kolker v. Duke City Collection Agency*, 750 F Supp 468 (DNM 1990).

If it is anticipated that the mediation service would involve the practice of law, such as by drafting settlement agreements, then Oregon RPC 5.4(b) and (d) prohibit Lawyer and Psychologist from forming a partnership, or professional corporation, or other association in which Psychologist owns an interest. Oregon RPC 5.5(a) is also relevant:

A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

*See also In re Jones, supra.* The net result of these provisions is that Lawyer may not aid or assist Psychologist in doing acts that would constitute the practice of law; that Lawyer and Psychologist may not form a partnership that includes the practice of law; that Lawyer may not work as Psychologist's agent or employee in providing legal services to others, and that Lawyer and Psychologist may not jointly own a corporation whose business consists in whole or in part of the practice of law.

### 3. *Use of a Trade Name.*

If the mediation service would not involve the practice of law, there would be no particular ethical limitation on the use of a trade name other than the general obligation to avoid "conduct involving dishonesty, fraud, deceit or misrepresentation that reflects adversely on the lawyer's fitness to practice law." Oregon RPC 8.4(a)(3).

If the business of the mediation service includes the practice of law, attention must also be given to Oregon RPC 7.5(ea).<sup>1</sup> The name “Family Mediation Center” appears to be permissible as a trade name that is not misleading. *Cf. In re Shannon/Johnson*, 292 Or 339, 638 P2d 482 (1982).

4. *Allocation of Profits or Fees.*

If the mediation service would not involve the practice of law, there is no ethical restriction on the allocation of profits or fees.

If the mediation service would involve the practice of law, Lawyer would be prohibited from sharing fees with Psychologist pursuant to Oregon RPC 5.4(a) but could hire Psychologist on a salary basis.<sup>2</sup> *Cf. OSB Formal Ethics Op Nos 2005-25, 2005-10.*

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<sup>1</sup> Oregon RPC 7.5(ea) provides:

~~(a) A lawyer shall not use a firm name, letterhead or other professional designation that violates Rule 7.1. A trade name may be used by a lawyer in private practice if it does not imply a connection with a government agency or with a public or charitable legal services organization and is not otherwise in violation of Rule 7.1.(c) — A lawyer in private practice:~~

~~(1) shall not practice under a name that is misleading as to the identity of the lawyer or lawyers practicing under such name or under a name that contains names other than those of lawyers in the firm;~~

~~— (2) — may use a trade name in private practice if the name does not state or imply a connection with a governmental agency or with a public or charitable legal services organization and is not otherwise in violation of Rule 7.1; and~~

~~— (3) — may use in a firm name the name or names of one or more of the retiring, deceased or retired members of the firm or a predecessor law firm in a continuing line of succession. The letterhead of a lawyer or law firm may give the names and dates of predecessor firms in a continuing line of succession and may designate the firm or a lawyer practicing in the firm as a professional corporation.~~

As a general proposition, Oregon RPC 7.1 prohibits a lawyer from making any false or misrepresentations or misleading statements, impressions, or expectations in communications about the lawyer or the lawyer’s services.

<sup>2</sup> Whether there are any ethical or legal limitations with respect to Psychologist’s practice that would prevent Lawyer from owning a part of Psychologist’s practice is a question that we have not been asked to consider and therefore do not consider. *Cf. OSB Formal Ethics Op No 2005-10.*

COMMENT: For additional information on this general topic or other related subjects, see THE ETHICAL OREGON LAWYER §§ 2.18–2.20, 12.3, 12.9–12.11, 12.15, 12.25 (Oregon CLE 2003~~6~~); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§ 3–4, 9–10 (2003); and ABA Model Rules 2.4, 5.4–5.5, 7.5, 8.4(c).



~~Approved by Board of Governors, August 2005.~~

**FORMAL OPINION NO. 2005-108**  
**Information About Legal Services:**  
**Dual Professions, Yellow Pages Advertising**

**Facts:**

Lawyer has an active family mediation practice. In addition to advertising this practice under the “Attorneys” section of the Yellow Pages, Lawyer desires to advertise under the “Counselors—Marriage, Family, Child and Individual” section of the Yellow Pages.

**Question:**

May Lawyer advertise under the “Counselors—Marriage, Family, Child and Individual” section of the Yellow Pages?

**Conclusion:**

Yes, qualified.

**Discussion:**

Oregon RPC 7.1(a) provides, in pertinent part:

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer’s services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.

~~A lawyer shall not make or cause to be made any communication about the lawyer or the lawyer’s firm, whether in person, in writing, electronically, by telephone or otherwise, if the communication:~~

~~\_\_\_\_\_ (1) \_\_\_\_\_ contains a material misrepresentation of fact or law, or omits a statement of fact or law necessary to make the communication considered as a whole not materially misleading;~~

~~\_\_\_\_\_ (2) \_\_\_\_\_ is intended or is reasonably likely to create a false or misleading expectation about results the lawyer or the lawyer’s firm can achieve;~~

~~\_\_\_\_\_ . . .~~

~~\_\_\_\_\_ (4) \_\_\_\_\_ states or implies that the lawyer or the lawyer’s firm specializes in, concentrates a practice in, limits a practice to, is experienced in, is presently handling or is qualified to handle matters or areas of law if the statement or implication is false or misleading;~~

~~\_\_\_\_\_ . . .~~

~~\_\_\_\_\_ (11) \_\_\_\_\_ is false or misleading in any manner not otherwise described above; or~~

~~\_\_\_\_\_ (12) \_\_\_\_\_ violates any other Rule of Professional Conduct or any statute or regulation applicable to solicitation, publicity or advertising by lawyers.~~

Oregon RPC 7.5(a) and (c) provides:

~~(a) — (a) A lawyer shall not use a firm name, letterhead or other professional designation that violates Rule 7.1. A trade name may be used by a lawyer in private practice~~

~~if it does not imply a connection with a government agency or with a public or charitable legal services organization and is not otherwise in violation of Rule 7.1. A lawyer may use professional announcement cards, office signs, letterheads, telephone and electronic directory listings, legal directory listings or other professional notices so long as the information contained therein complies with Rule 7.1 and other applicable Rules.~~

~~.....~~

~~(c) — A lawyer in private practice:~~

~~.....~~

~~(2) — may use a trade name in private practice if the name does not state or imply a connection with a governmental agency or with a public or charitable legal services organization and is not otherwise in violation of Rule 7.1. ....~~

*See also* OSB Formal Ethics Op No 2005-101 (mediation services generally).

If Lawyer intends to maintain an independent business as a counselor, separate and apart from Lawyer's legal business, Lawyer may do so. OSB Formal Ethics Op No 2005-10. Lawyer's advertising and conduct of that separate business cannot, however, include "conduct involving dishonesty, fraud, deceit or misrepresentation that reflects adversely on the lawyer's fitness to practice law." Oregon RPC 8.4(a)(3); *see In re Houchin*, 290 Or 433, 622 P2d 723 (1981); *In re Staar*, 324 Or 283, 924 P2d 308 (1996) (fact that lawyer was not acting as lawyer at time of false swearing in petition for family abuse prevention restraining order did not diminish lawyer's culpability).

If Lawyer intends to advertise *as a lawyer* in the Counselor section of the Yellow Pages, Lawyer may do so if the advertisement is not false or misleading or otherwise in violation of Oregon RPC 8.4(a)(3), 7.1, and 7.5. A person reading an advertisement in the Counselor section of the Yellow Pages would normally be seeking counseling services, not legal services, and would otherwise tend to believe that an advertiser has special qualifications in, and is offering services in, counseling. Accordingly, the advertisement must reflect Lawyer's status as a lawyer offering services as a family mediator.

~~Approved by Board of Governors, August 2005.~~

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COMMENT: For additional information on this general topic and other related subjects, see THE ETHICAL OREGON LAWYER §§ 2.6–2.7, 2.20 (Oregon CLE 2003~~6~~); and ABA Model Rules 7.1, 7.5, 8.4(c). *See also* Washington Informal Ethics Op Nos 1488, 1528 (~~unpublished~~).

**FORMAL OPINION NO. 2005-109**  
**Letterhead Listing an Out-of-State Law Firm**  
**as “Associated Office”**

**Facts:**

Oregon Law Firm contracts with Washington Law Firm to represent Washington Law Firm’s clients in state and federal litigation in Oregon when permissible. Oregon Law Firm would like to print stationery with its name and address at the top, and with the following at the bottom:

“ASSOCIATED OFFICE: Washington Law Firm, [address and telephone number]”

Similarly, Washington Law Firm would like to put Oregon Law Firm’s name, address, and telephone number at the bottom of its stationery as “Associated Office.”

**Questions:**

1. May Oregon Law Firm use stationery with Washington Law Firm listed as “Associated Office”?
2. May Oregon Law Firm permit Washington Law Firm to list it as “Associated Office”?

**Conclusions:**

1. Yes.
2. Yes.

**Discussion:**

Oregon RPC 7.1 ~~(a)~~ provides, in pertinent part:

\_\_\_\_\_—A lawyer shall not make a false or misleading communication about the lawyer or the lawyer’s services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.

~~(a) — A lawyer shall not make or cause to be made any communication about the lawyer or the lawyer’s firm, whether in person, in writing, electronically, by telephone or otherwise, if the communication:~~

~~\_\_\_\_\_ (1) — contains a material misrepresentation of fact or law, or omits a statement of fact or law necessary to make the communication considered as a whole not materially misleading;~~

~~\_\_\_\_\_ (2) — is intended or is reasonably likely to create a false or misleading expectation about results the lawyer or the lawyer’s firm can achieve;~~

~~\_\_\_\_\_ . . .~~

~~\_\_\_\_\_ (7) \_\_\_\_\_ states or implies that one or more persons depicted in the communication are lawyers who practice with the lawyer or the lawyer's firm if they are not;~~

~~\_\_\_\_\_ . . .~~

~~\_\_\_\_\_ (11) \_\_\_\_\_ is false or misleading in any manner not otherwise described above; or~~

~~\_\_\_\_\_ (12) \_\_\_\_\_ violates any other Rule of Professional Conduct or any statute or regulation applicable to solicitation, publicity or advertising by lawyers.~~

~~\_\_\_\_\_ Oregon RPC 7.5(a) and (b) provide:~~

~~\_\_\_\_\_ (a) A lawyer shall not use a firm name, letterhead or other professional designation that violates Rule 7.1. A trade name may be used by a lawyer in private practice if it does not imply a connection with a government agency or with a public or charitable legal services organization and is not otherwise in violation of Rule 7.1.~~

~~\_\_\_\_\_ (b) A law firm with offices in more than one jurisdiction may use the same name or other professional designation in each jurisdiction, but identification of the lawyers in an office of the firm shall indicate the jurisdictional limitations on those not licensed to practice in the jurisdiction where the office is located.~~

~~\_\_\_\_\_ (a) \_\_\_\_\_ A lawyer may use professional announcement cards, office signs, letterheads, telephone and electronic directory listings, legal directory listings or other professional notices so long as the information contained therein complies with Rule 7.1 and other applicable Rules.~~

~~\_\_\_\_\_ (b) \_\_\_\_\_ A lawyer may be designated "Of Counsel" on a letterhead if the lawyer has a continuing professional relationship with a lawyer or law firm, other than as a partner or associate. A lawyer may be designated as "General Counsel" or by a similar professional reference on stationary of a client if the lawyer or the lawyer's firm devotes a substantial amount of professional time in the representation of the client.~~

ABA Formal Ethics Op No 84-351 (1984) provides further guidance:

The basic requirement regarding lawyer advertising . . . is that communications by a lawyer concerning legal services must not be false or misleading. [Citation omitted.] Thus, designation by a lawyer or law firm of another law firm on a letterhead or in any other communication, including any private communication with a client or other person, as "affiliated" or "associated" with the lawyer or law firm must be consistent with the actual relationship. Communication that another law firm is "affiliated" or "associated" is not misleading if the relationship comports with the plain meaning which persons receiving the communication would normally ascribe to those words or is used only with other information necessary adequately to describe the relationship and avoid confusion. An "affiliated" or "associated" law firm would normally mean a firm that is closely associated or connected with the other lawyer or firm in an ongoing and regular relationship. [Footnote omitted.]

. . . .

The type of relationship that is implied by designating another firm as "affiliated" or "associated" is analogous to the ongoing relationship that is required . . . when using the designation "Of Counsel." . . . The relationship must be close and regular, continuing and semi-permanent, and not merely that of forwarder-receiver of legal business. The

“affiliated” or “associated” firm must be available to the other firm and its clients for consultation and advice.

In this case, the “Associated Office” designation is not false or misleading and therefore complies with Oregon RPC 7.1 and 7.5.<sup>1</sup>

Because the comparable Washington rules, *see* Washington RPC 7.1 ~~et seq.~~ 5, are to the same effect as the Oregon rules, we need not consider the problems that would be raised if Oregon Law Firm were engaged in a practice that caused Washington Law Firm to violate the Washington ethics rules.

~~Approved by Board of Governors, August 2005.~~

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<sup>1</sup> If, however, the letterhead were to list the individual lawyers “associated” in addition to or in lieu of the firm names, the jurisdiction in which each lawyer is licensed to practice would have to be shown in order for the letterhead not to be misleading. *Cf.* Oregon RPC 7.5(b); RPC 8.4(a)(3) (prohibiting “conduct involving dishonesty, fraud, deceit or misrepresentation that reflects adversely on the lawyer’s fitness to practice law”); ~~Oregon RPC 7.5(f) (requiring that jurisdictional limitations be shown when multistate law firm letterheads list individual lawyers).~~

COMMENT: For additional information on this general topic and other related subjects, see THE ETHICAL OREGON LAWYER §§2.189–2.22 (Oregon CLE 20036); and ABA Model Rules 7.1, 7.5, 8.4(c). *See also* Washington Informal Ethics Op No 1015 ~~(unpublished)~~.

**FORMAL OPINION NO. 2005-120**

[REVISED 201507]

**Conflicts of Interest, Former Clients:  
Lawyer Changing Firms, Former Prosecutor or Judge,  
Disqualification, Screening**

**Facts:**

The *ABC* law partnership does criminal defense work. Lawyer *A* proposes to leave the partnership and go to work as a deputy district attorney for the state.

Deputy District Attorney *D* proposes to leave the district attorney's office and join with Lawyer *E* and Lawyer *F* to form the *DEF* law partnership. The *DEF* law partnership proposes to represent criminal defendants in criminal cases that would be brought by the district attorney's office.

Circuit Court Judge *G* proposes to leave the bench and join with Lawyer *H* and Lawyer *I* to form the *GHI* law partnership. The *GHI* law partnership proposes to represent or oppose clients who had matters pending before Lawyer *G* while Lawyer *G* was a judge.

**Questions:**

1. To what extent may Lawyer *A* or other lawyers in the district attorney's office prosecute clients of the *ABC* law partnership?
2. To what extent may Lawyer *D* or other lawyers in the *DEF* law partnership represent criminal defendants in criminal matters?
3. To what extent may Lawyer *G* or other lawyers in the *GHI* law partnership represent or oppose parties who had matters pending before Lawyer *G* when Lawyer *G* was on the bench?

**Conclusions:**

1. With respect to Lawyer *A*, who is leaving private criminal defense practice to become a deputy district attorney, a three-part answer is appropriate:
  - a. Lawyer *A* cannot prosecute a person who was formerly represented by Lawyer *A* in the same or a substantially related matter, unless the former client and the state give informed consent, confirmed in writing.
  - b. Lawyer *A* cannot prosecute a former client of the *ABC* firm about whom Lawyer *A* obtained confidential information that is material to the matter without the informed consent of the *ABC* firm's former client and the state, confirmed in writing.

- c. Lawyer A's disqualification is not imputed to the other lawyers in the district attorney's office under Oregon RPC 1.11(d).
2. With respect to Lawyer D, who is leaving the district attorney's office for private criminal defense practice, a similar three-part answer is appropriate:
  - a. Lawyer D cannot defend clients in matters that are the same or substantially related to matters that Lawyer D handled at the district attorney's office, unless the client and the state give informed consent, confirmed in writing.
  - b. Lawyer D cannot defend a client on a matter that was prosecuted by other deputy district attorneys during Lawyer D's tenure in the office if Lawyer D obtained confidential information that is material to the matter, except with the informed consent of the client and the state, confirmed in writing.
  - c. Lawyer D's disqualification will be imputed to the other lawyers in the DEF firm, unless Lawyer D is screened from participating in the matter pursuant to Oregon RPC 1.10(c).
3. With respect to Lawyer G, who is leaving the bench for private practice, a three-part answer also is appropriate:
  - a. If Lawyer G did not participate personally and substantially as a judge in a matter in which Lawyer G or the GHI firm proposes to represent a party, neither Lawyer G nor other lawyers in the GHI firm would be prohibited from handling the matter.
  - b. If Lawyer G participated personally or substantially in a matter as a judge, Lawyer G cannot work on that matter in private practice without the informed consent of all parties, confirmed in writing.
  - c. Lawyer G's disqualification will be imputed to the other lawyers in the GHI firm, unless Lawyer G is screened from participating in the matter pursuant to Oregon RPC 1.10(c).

**Discussion:**

I. *Question No. 1 (Private Practice to Government Service).*

A. *Introduction*

When Lawyer A leaves the ABC firm, Lawyer A will have a "former client" relationship with the firm's clients for purposes of Oregon RPC 1.9.<sup>1</sup> See *In re Brandsness*, 299 Or 420,

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<sup>1</sup> Oregon RPC 1.9 provides:



427–428, 702 P2d 1098 (1985). Pursuant to Oregon RPC 1.9(a), a lawyer is prohibited from acting adversely to a former client if the current and former matters are the same or substantially related. Matters are “substantially related” if they involve the same transaction or legal dispute or if there is a substantial risk that confidential factual information obtained in the prior representation would materially advance the current client’s position in the new matter. Oregon RPC 1.9(ad); ABA Model Rule 1.9 comment [3].

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(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person’s interests are materially adverse to the interests of the former client unless each affected client gives informed consent, confirmed in writing.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client:

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter, unless each affected client gives informed consent, confirmed in writing.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

(d) For purposes of this rule, matters are “substantially related” if (1) the lawyer’s representation of the current client will injure or damage the former client in connection with the same transaction or legal dispute in which the lawyer previously represented the former client; or (2) there is a substantial risk that confidential factual information as would normally have been obtained in the prior representation of the former client would materially advance the current client’s position in the subsequent matter.

A lawyer also will have a conflict with a client of the lawyer's former law firm, even if the lawyer did no work on the client's matters at the former firm, if the lawyer acquired confidential information material to the current client's matter. Oregon RPC 1.9(b); OSB Formal Ethics Op Nos 2005-11, 2005-17.

If a conflict exists under either Oregon RPC 1.9(a) or (b), the lawyer may proceed with the representation if all affected clients give their informed consent, confirmed in writing.<sup>2</sup> The duties owed to former clients under ORS 9.460(3) and Oregon RPC 1.6<sup>3</sup> are coextensive with the duties under Oregon RPC 1.9. OSB Formal Ethics Op No 2005-17.

<sup>2</sup> Oregon RPC 1.0(b) and (g) provide:

(b) "Confirmed in writing," when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. . . . If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.

. . . .

(g) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct. When informed consent is required by these Rules to be confirmed in writing or to be given in a writing signed by the client, the lawyer shall give and the writing shall reflect a recommendation that the client seek independent legal advice to determine if consent should be given.

<sup>3</sup> Oregon RPC 1.6 provides, in pertinent part:

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

- (1) to disclose the intention of the lawyer's client to commit a crime and the information necessary to prevent the crime;
- (2) to prevent reasonably certain death or substantial bodily harm;
- (3) to secure legal advice about the lawyer's compliance with these Rules;
- (4) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;
- (5) to comply with other law, court order, or as permitted by these Rules: . . . [.]

ORS 9.460(3) requires a lawyer to "[m]aintain the confidences and secrets of the attorney's clients consistent with the rules of professional conduct established pursuant to ORS 9.490."

It follows that, unless a particular prosecution would result in Lawyer A's being adverse to one of Lawyer A's former clients in a matter that is the same or substantially related to Lawyer A's prior representation of the client, or unless Lawyer A acquired confidential information about a client represented by another member of Lawyer A's former firm, neither Lawyer A nor any other lawyer in the district attorney's office would be disqualified from handling the matter. Even if such a conflict existed, on obtaining informed consent, confirmed in writing, Lawyer A and the other lawyers in the office could proceed.<sup>4</sup> Oregon RPC 1.9(a)–(b).

B. *Determining When a Conflict Exists* .

1. *Former Client Conflicts*.

For purposes of the Oregon RPCs, a “matter” includes “any judicial or other proceeding, application, request for ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest, or other particular matter involving a specific party or parties[.]” Oregon RPC 1.0(i). The scope of a matter and the degree of a lawyer's involvement in it depend on the facts of the particular situation or transaction.

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<sup>4</sup> Although all district attorneys' offices represent one client in criminal matters, i.e., the state, each district attorney's office is a separate “firm” for purposes of Oregon RPC 1.7–1.10. The relationship between district attorneys' offices is unlike that between branch offices of a private law firm. *See* ORS 8.610 (governing district attorneys' offices). *Compare Westinghouse Elec. Corp. v. Kerr-McGee Corp.*, 580 F2d 1311, 1318 (7th Cir 1978) (branch offices of private firms constitute one “firm” for conflict-of-interest purposes), *with First Small Business Investment Co. v. Intercapital Corp.*, 738 P2d 263, 267 (Wash 1987) (disqualification of one firm on conflict-of-interest grounds would not result per se in disqualification of a separate firm acting as co-counsel).

*See also* Oregon RPC 1.0(d):

“Firm” or “law firm” denotes a lawyer or lawyers, including “Of Counsel” lawyers, in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a private or public legal aid or public defender organization, a legal services organization or the legal department of a corporation or other public or private organization. Any other lawyer, including an office sharer or a lawyer working for or with a firm on a limited basis, is not a member of a firm absent indicia sufficient to establish a de facto law firm among the lawyers involved.

Absent the required consents, a lawyer who has been directly involved in a client's specific legal proceeding or transaction cannot subsequently represent other clients with materially adverse interests in that same proceeding or transaction. On the other hand, a lawyer who has handled several matters of a type for a client is not thereafter precluded from representing another client in a factually distinct matter of the same type, even if the subsequent client's interests are adverse to the interests of the former client. The underlying question is whether the lawyer's involvement in the matter was such that subsequent representation of another client constitutes a changing of sides in the matter in question. ABA Model Rule 1.9 comment [2].

Matters are "substantially related" within the meaning of Oregon RPC 1.9 if they involve the same matter or transaction or if there "otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter." ABA Model Rule 1.9 comment [3]. Under *former* DR 5-105(C), the first of these was referred to as a "matter-specific" conflict, and the latter was referred to as an "information-specific" conflict.

In *In re Brandsness*, which was decided under *former* DR 5-105, the court concluded that lawyer Brandsness had both a matter-specific and an information-specific former client conflict when he represented a husband in dissolution proceedings that included an effort to prevent the wife from continuing to participate in what had been the family business. The court held that, because Brandsness had previously represented both the wife and the husband in the formation and operation of the business, his attempt to preclude her from participating in its operation was sufficiently related to his earlier representation as to constitute a conflict. The court held, however, that the case was at the periphery of such a conflict. *In re Brandsness*, 299 Or at 433. *See also* OSB Formal Ethics Op No 2005-11.

In the situation presented here, if Lawyer A endeavored to bring a robbery prosecution against a former client and the robbery appeared to be part of a pattern of robberies, and if Lawyer A had previously participated in the defense of the former client in one of those robberies, the new prosecution would be substantially related to Lawyer A's prior defense of the former client and would constitute a former client conflict under Oregon RPC 1.9(a). Conversely, if the robbery defendant previously had been defended by Lawyer A in a DUII matter, there would be a conflict only if Lawyer A acquired confidential information while representing the former client that could materially advance the prosecution of the robbery case.<sup>5</sup>

## 2. *Former Firm Conflicts.*

Former client conflicts can arise not only from being formally assigned to work on a matter, but also from less formal contacts. Suppose, for example, that while Lawyer A was still

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<sup>5</sup> Confidential information is "information relating to the representation of a client," and includes both information protected by the attorney-client privilege under applicable law and "other information gained in a current or former professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client." Oregon RPC 1.0(f).

at the *ABC* firm, Lawyer *B* had informally sought and obtained Lawyer *A*'s advice with respect to a matter that Lawyer *B* was otherwise handling. Upon Lawyer *A*'s subsequent departure from the *ABC* firm, Lawyer *A* would be prohibited from representing a new client in a matter that is the same or substantially related to the matter Lawyer *B* consulted about if the interests of the former firm's client and Lawyer *A*'s new client are adverse and if Lawyer *A* acquired confidential information material to the new matter. Oregon RPC 1.9(b).

No exhaustive description of what constitutes confidential client information can be given. *Cf.* OSB Formal Ethics Op No 2005-17. Nevertheless, several illustrations may be helpful, and lawyers should be mindful that former client conflicts based on the acquisition of material confidential information can arise from informal exchanges within a firm. If Lawyer *A* was assigned to prosecute a DUII charge against a defendant who had previously been represented by another lawyer at the *ABC* firm, during the course of which representation Lawyer *A* acquired actual knowledge about the defendant's drinking problems, Lawyer *A* would have a former client conflict based on possession of that material information. But if Lawyer *A* had never discussed the details of the *ABC* firm's representation of the defendant and acquired no confidential information material to the DUII prosecution, the fact that Lawyer *A*'s former firm had such information does not disqualify Lawyer *A* from prosecuting the new charge.

C. *Representation with Informed Consent, Confirmed in Writing.*

If a conflict exists with respect to a former client, a lawyer may not proceed without informed consent, confirmed in writing, from both the former client and the current client. Oregon RPC 1.9, 1.11(d)(2)(v); OSB Formal Ethics Op Nos 2005-11, 2005-17. *See also In re Balocca*, 342 Or 279, 296, 151 P3d 154 (2007). This means that, in the absence of informed consent of the former client and the state, Lawyer *A* could not do *any* work on a matter—even preliminary discovery or legal research.

D. *No Imputation of Conflict to Other Members of the District Attorney's Office.*

Under Oregon RPC 1.10(c), "no lawyer associated in the firm shall knowingly represent a person in a matter in which that lawyer is disqualified under Rule 1.9, unless the personally disqualified lawyer is screened from any form of participation or representation in the matter." However, under Oregon RPC 1.10(e), "[t]he disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11." In a situation in which a lawyer becomes a government employee, such as Lawyer *A*'s employment with the district attorney's office, Oregon RPC 1.11(d) controls the analysis regarding imputation of the conflict and screening, if Lawyer *A* is personally disqualified because consent to a conflict is not given.

Oregon RPC 1.11(d) provides, in pertinent part:

- (d) Except as law may otherwise expressly permit, a lawyer currently serving as a public officer or employee:

- (1) is subject to Rules 1.7 and 1.9; and
- (2) shall not:

...

(iv) either while in office or after leaving office use information the lawyer knows is confidential government information obtained while a public officer to represent a private client.

(v) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless the lawyer's former client and the appropriate government agency give informed consent, confirmed in writing[.]

Oregon RPC 1.11(d) contains no provision that imputes a conflict to other lawyers associated with the disqualified lawyer in a government law firm.<sup>6</sup> Comment [2] to ABA Model Rule 1.11 explains:

Because of the special problems raised by imputation within a government agency, paragraph (d) does not impute the conflicts of a lawyer currently serving as an officer or employee of the government to other associated government officers or employees, although ordinarily it will be prudent to screen such lawyers.

*See also* 1 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, *THE LAW OF LAWYERING* §15.3, at 15-10 (3d ed Supp 2005-1) (“woodenly applying the automatic imputation rule that usually governs private law firms would be impractical and against the public interest”).

Therefore, while the Oregon RPCs do not impute Lawyer A's conflicts to other members of the district attorney's office, and so screening is not required, it is prudent to screen Lawyer A from those matters in which Lawyer A is disqualified. HAZARD & HODES, *supra*, §15.9, at 15-32.

## II. *Question No. 2 (Government Service to Private Practice).*

Oregon RPC 1.6, 1.7,<sup>8</sup> and 1.9 apply to Lawyer D (who is transferring from government service to private practice), just as they apply to Lawyer A (who is transferring

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<sup>6</sup> Under Oregon RPC 1.11(b), however, a conflict is imputed to other members of a *former* government employee's firm, as will be discussed in Question No. 2.

<sup>8</sup> Oregon RPC 1.7 provides:

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a current conflict of interest. A current conflict of interest exists if:

- (1) the representation of one client will be directly adverse to another client;

from private practice to government service). With respect to Lawyer *D*, as with Lawyer *A*, Oregon RPC 1.11 governs the disqualification and imputation analysis, pursuant to Oregon RPC 1.10(e).

Oregon RPC 1.11(a), (b), and (c), which relate to former government lawyers, provide:

- (a) Except as Rule 1.12 or law may otherwise expressly permit, a lawyer who has formerly served as a public officer or employee of the government:
    - (1) is subject to Rule 1.9(c); and
    - (2) shall not otherwise represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its informed consent, confirmed in writing, to the representation.
  - (b) When a lawyer is disqualified from representation under paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:
    - (1) the disqualified lawyer is timely screened from any participation in the matter substantially in accordance with the procedures set forth in Rule 1.10(c); and
    - (2) written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this rule.
- 
- (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer; or
  - (3) the lawyer is related to another lawyer, as parent, child, sibling, spouse or domestic partner, in a matter adverse to a person whom the lawyer knows is represented by the other lawyer in the same matter.
- (b) Notwithstanding the existence of a current conflict of interest under paragraph (a), a lawyer may represent a client if:
- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
  - (2) the representation is not prohibited by law;
  - (3) the representation does not obligate the lawyer to contend for something on behalf of one client that the lawyer has a duty to oppose on behalf of another client; and
  - (4) each affected client gives informed consent, confirmed in writing.

(c) Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. As used in this Rule, the term “confidential government information” means information that has been obtained under governmental authority and which, at the time this Rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose and which is not otherwise available to the public. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is timely screened from any participation in the matter substantially in accordance with the procedures set forth in Rule 1.10(c).

Oregon RPC 1.11(a) prohibits Lawyer *D* from representing criminal defendants in matters in which Lawyer *D* “participated personally and substantially” while a government prosecutor. *See* ABA Formal Ethics Op No 342 (1975) (“substantial responsibility” . . . contemplates a responsibility requiring the official to become personally involved to an important, material degree”); *Cleary v. District Court*, 704 P2d 866, 870 (Colo 1985) (the critical test of improper conduct by former government employees is the requirement that the attorney have “substantial responsibility” in the matter while employed by the government). Thus, if Lawyer *D* did no work on a particular matter or acquired no material confidential information from Lawyer *D*’s “former client” (i.e., the state)<sup>9</sup> while at the district attorney’s office, neither Lawyer *D* nor the *DEF* law partnership would be limited in the subsequent handling of the matter. If, however, Lawyer *D* worked on a matter or acquired information protected by Oregon RPC 1.6 that is sufficiently capable of adverse use, Oregon RPC 1.6, 1.7, 1.9, and 1.11 would prohibit Lawyer *D* from handling the matter absent informed consent, confirmed in writing.

Lawyer *D* also may be disqualified by the acquisition of “confidential government information” that does not constitute confidential client information. District attorneys and their deputies are public officials. ORS 8.610, 8.760. The reference in Oregon RPC 1.11(c) to information that “the government . . . has a legal privilege not to disclose” may encompass information that would not otherwise constitute confidential client information under Oregon RPC 1.6, but which the government is not required to disclose. *See* HAZARD & HODES, *supra*, §15.8. Absent government consent in the case of government-privileged information, Lawyer *D* may not work on a matter in private practice in which Lawyer *D* had previously acquired “confidential government information.”

Even if Lawyer *D* must be disqualified for the reasons discussed above, imputing Lawyer *D*’s disqualification to the other members of the *DEF* firm can be avoided if Lawyer *D* is screened in accordance with Oregon RPC 1.10(c) and written notice is given promptly to the district attorney’s office as provided in Oregon RPC 1.11(b).

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<sup>9</sup> *See* OSB Formal Ethics Op No 2005-122.



III. *Question No. 3 (Judicial Service to Private Practice).*

Oregon RPC 1.6, 1.7, and 1.9 do not apply to Judge *G* (who is leaving judicial service for private practice) because the litigants who appeared before Judge *G* were not Judge *G*'s clients. Oregon RPC 1.11(a), (c), and (d) also do not apply for that reason. Lawyer *G*'s subsequent representation of litigants is limited, however, by Oregon RPC 1.12(a):

Except as stated in paragraph (d) and Rule 2.4(b) ~~and in paragraph (d)~~, a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer or law clerk to such a person or as an arbitrator, mediator or other third-party neutral, unless all parties to the proceeding give informed consent, confirmed in writing.

The personal-and-substantial-participation requirement means that Lawyer *G* must have become “personally involved to an important, material degree” before Lawyer *G* will be disqualified. *See* ABA Formal Ethics Op No 342, *supra*. What is “important” or “material” varies with the circumstances. In the ordinary course, however, Lawyer *G* must have done something more than review the status of a matter in court or at docket call or permit the entry of a stipulated order before Lawyer *G*'s involvement will be deemed to have been personal and substantial. *See* ABA Model Rule 1.12 comment [1] (personal and substantial participation does not include “remote or incidental administrative responsibility that did not affect the merits”). If Lawyer *G* did not participate personally and substantially in a matter as a judge, neither Lawyer *G* nor the other lawyers in the *GHI* firm would be limited in their handling of the matter.

Oregon RPC 1.12(a) provides, however, that if Lawyer *G* participated personally and substantially as a judge, Lawyer *G* may not work on a matter without the informed consent of all parties, confirmed in writing. Furthermore, Lawyer *G*'s disqualification is imputed to the other members of the firm under Oregon RPC 1.12(c), unless Lawyer *G* is screened from the matter.

Oregon RPC 1.12(c) provides:

- (c) If a lawyer is disqualified by paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in the matter unless:
  - (1) the disqualified lawyer is timely screened from any participation in the matter substantially in accordance with the procedures set forth in Rule 1.10(c); and
  - (2) written notice is promptly given to the parties and any appropriate tribunal to enable them to ascertain compliance with the provisions of this rule.

Thus, if Lawyer *G* is screened in accordance with Oregon RPC 1.10(c) and written notice is provided in accordance with Oregon RPC 1.12(c)(2), the other lawyers in the *GHI* firm may proceed with the representation.

~~Approved by Board of Governors, June 2007.~~

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COMMENT: For additional information on this topic and other related subjects, see THE ETHICAL OREGON LAWYER §§9.2–9.5, 9.22–9.23, 14.27 (Oregon CLE 2006); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§121–124, 132–133 (2003); and ABA Model Rules 1.9–1.12.

**FORMAL OPINION NO. 2005-153**  
**Information About Legal Services:**  
**Insurer-Employed Lawyers' Firm Name**

**Facts:**

Lawyers *A* and *B* are employees of an insurer and defend insureds' liability claims for the insurer.

**Question:**

Can *A* and *B* refer to themselves on their letterhead and pleadings as "A & B, Attorneys at Law," "A & B, Attorneys at Law, Not a Partnership," or "A and B, Attorneys at Law, an Association of Lawyers," without disclosing their status as employees of the insurer?

**Conclusion:**

No.

**Discussion:**

Oregon RPC 7.1(a) provides:

~~(a) — A lawyer shall not make or cause to be made any communication about the lawyer or the lawyer's firm, whether in person, in writing, electronically, by telephone or otherwise, if the communication:~~

~~— (1) — contains a material misrepresentation of fact or law, or omits a statement of fact or law necessary to make the communication considered as a whole not materially misleading;~~

~~— . . .~~

~~— (11) — is false or misleading in any manner not otherwise described above; or~~

~~— (12) — violates any other Rule of Professional Conduct or any statute or regulation applicable to solicitation, publicity or advertising by lawyers.~~  
A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.

Oregon RPC 7.5 provides, in pertinent part:

(a) A lawyer shall not use a firm name, letterhead or other professional designation that violates Rule 7.1. A trade name may be used by a lawyer in private practice if it does not imply a connection with a government agency or with a public or charitable legal services organization and is not otherwise in violation of Rule 7.1.

\* \* \*

~~\_\_\_\_\_ (d) Lawyers may state or imply that they practice in a partnership or other organization only when that is a fact.~~

~~(e) — A lawyer in private practice:~~

~~—(1) — shall not practice under a name that is misleading as to the identity of the lawyer or lawyers practicing under such name or under a name that contains names other than those of lawyers in the firm.~~

~~\_\_\_\_\_~~

~~—(e) — Lawyers shall not hold themselves out as practicing in a law firm unless the lawyers are actually members of the firm.~~

See also Oregon RPC 8.4(a)(3), which prohibits “conduct involving dishonesty, fraud, deceit or misrepresentation . . . .” In short, and as these and other sections illustrate, lawyers cannot mislead others, whether they are clients or third parties.

Courts in other jurisdictions have held that failure to identify lawyer employees of an insurer is misleading. In *In re Weiss, Healey & Rea*, 536 A2d 266, 268–269 (NJ 1988), the court said:

The question here is whether there is anything deceptive about the use of a name like “A, B & C” to describe the association of lawyer employees of an insurance company. We believe that it is evident that the mere use of the name “A, B & C” does not convey “with accuracy and clarity” the complex set of relationships that distinguish an association of lawyers representing a single insurer and its policyholders from an association of lawyers affiliated for the general practice of law. Yet, what secondary meaning *does* this form of firm name convey to the public? What does it tell us about the “kind and caliber” of legal services rendered by such an association?

We believe that the message conveyed by the firm name “A, B & C” is that the three persons designated are engaged in the general practice of law in New Jersey as partners. Such partnership implies the full financial and professional responsibility of a law firm that has pooled its resources of intellect and capital to serve a general clientele. The partnership arrangement implies much more than office space shared by representatives of a single insurer. Put differently, the designation “A, B & C” does not imply that the associated lawyers are in fact employees, with whatever inferences a client might draw about their ultimate interest and advice. The public, we believe, infers that the collective professional, ethical, and financial responsibility of a partnership-in-fact bespeaks the “kind and caliber of legal services rendered.”

In *Petition of Youngblood*, 895 SW2d 322, 331 (Tenn 1995), construing a rule ~~identical~~ similar to Oregon RPC 7.1 and 7.5 (*former* DR 2-102), the court held that “an attorney-employee is not ‘a separate and independent law firm.’ The representation that the attorney employee is separate and independent from the employer is, at least, false, misleading, and deceptive. It may be fraudulent, depending upon the circumstances under which the representation is made.”

See also California Formal Ethics Op No 1987-91 (1987 WL 109707), which concludes:

In the present context, the use of a firm name, other than “Law Division,” or an equivalent thereof, would be misleading in that clients of the Law Division—i.e., insureds—would be misled as to the relationship between the Insurance Company and its

lawyers. Clients would be unaware that the individual lawyers were employed by the Insurance Company and would assume that the entity was a separate law firm. For this reason, the letterhead used must indicate the relationship between the firm and the Law Division. For example, the letterhead could contain an asterisk identifying the firm as the Law Division for the Insurance Company.

Accordingly, a letterhead or other pleading that does not fully identify Lawyers *A* and *B* as employees of the insurer would be impermissible.

~~Approved by Board of Governors, August 2005.~~

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COMMENT: For additional information on this general topic and other related subjects, see THE ETHICAL OREGON LAWYER §§ 2.7, 2.12, 2.19 (Oregon CLE 2003~~3~~<sup>6</sup>); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 98 (2003); and ABA Model Rules 7.1, 7.5.

FORMAL OPINION NO 2006-176

[REVISED 2015]

Conflicts of Interest:

Lawyer Functioning in Multiple Roles in Client's Real Estate Transaction

**Facts:**

Client informs Lawyer that Client would like to buy or sell real estate. Lawyer is willing to represent Client in the transaction and does not represent any other party in the transaction. Lawyer would, however, like to act not only as Lawyer, but also as a real estate agent or broker and as a mortgage broker or loan officer in the transaction.

**Question:**

May Lawyer serve in all three capacities?

**Conclusion:**

Yes, qualified.

**Discussion:**

1. *Potential Limitations of Substantive Law.*

This Committee is authorized to construe statutes and regulations pertaining directly to lawyers, but not to construe substantive law generally. We therefore begin with the observation that if this joint combination of roles is prohibited by substantive law pertaining to real estate agents or brokers, mortgage brokers, or loan officers, Lawyer could not play multiple roles. Similarly, Lawyer would be obligated to meet in full any licensing, insurance, disclosure, or other obligations imposed by the substantive law pertaining to these lines of business. In the discussion that follows, therefore, we assume that there are no such requirements or, alternatively, that Lawyer will meet all such requirements.

2. *Lawyer-Client Conflicts of Interest.*

These facts present the potential for conflicts of interest between the Client and the Lawyer. Oregon RPC 1.7 states, in part:

- (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a current conflict of interest. A current conflict of interest exists if:

- (1) the representation of one client will be directly adverse to another client;
  - (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer; or
  - (3) . . . .
- (b) Notwithstanding the existence of a current conflict of interest under paragraph (a), a lawyer may represent a client if:
- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
  - (2) the representation is not prohibited by law;
  - (4) the representation does not obligate the lawyer to contend for something on behalf of one client that the lawyer has a duty to oppose on behalf of another client; and
  - (5) each affected client gives informed consent, confirmed in writing.

Under Oregon RPC 1.7, Lawyer's other business interests in the real estate transaction ~~would-could~~ give rise to a conflict under Oregon RPC 1.7(a)(2) ~~since-because~~ there is a significant risk that these other roles ~~would-might~~ interfere with Lawyer's representation of Client. This would be true whether Lawyer plays the nonlawyer roles as the owner or co-owner of a non-law business or as an employee or independent contractor for such a business. ~~In either instance, Lawyer's interest in fees or income from these other roles, if not also Lawyer's liability concerns from those other roles, would create a significant risk that Lawyer's ability to "exercise independent professional judgment and render candid advice" (Oregon RPC 2.1) would be compromised. Considering an Oregon lawyer's efforts to fulfill his function as both a Lawyer and a realtor, the Supreme Court said:~~

. . . contrary to the accused's argument, the [lawyer's] interest in acquiring a share of the sales commission is not identical to a lawyer's interest in recovering a contingency fee. A lawyer will recover a contingency fee only if the client succeeds in the matter on which the lawyer provides legal representation. In

contrast, the [lawyer's] ability to recover a sales commission did not turn on whether he advanced [his client's] legal interests in the transaction. Indeed, an insistence on protecting [his client's] legal interests could have prevented a sale from closing that, from a broker's perspective, may have made business sense. Therein, we think, lies the problem in the accused's serving as both [his client's] broker and lawyer. In advancing his client's business interests as a broker, the accused may have discounted risks that, as a lawyer, he should counsel his client to avoid or at least be aware of.<sup>1</sup>

It follows that ~~if~~ Lawyer ~~can undertake~~undertakes multiple roles ~~only if~~resulting in a conflict, Lawyer ~~can and does~~must comply with each of the requirements of Oregon RPC 1.7(b).<sup>2</sup> Before we turn to the requirements of Oregon RPC 1.7(b), however, we note that since Lawyer will be doing business with Client in Lawyer's additional roles, it is also necessary to consider the conflict-of-interest limitations in Oregon RPC 1.8(a):

- (a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:
  - (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;
  - (2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and

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<sup>1</sup> This opinion has been revised following the Court's opinion, In re Conduct of Spencer, 355 Or 679, 697 (2014), in which the court rejected the suggestion that simultaneously acting as attorney, real estate broker, and mortgage broker would, per se, constitute a current conflict of interest. The court said :

If, as other jurisdictions have held, additional aspects of a real estate transaction (on which the Bar does not rely here) can result in a current conflict under RPC 1.7(a)(2), careful lawyers who seek to serve as both a client's legal advisor and broker in the same real estate transaction would be advised to satisfy the advice and consent requirements of both RPC 1.8(a) and RPC 1.7(b). See ABA Model Rules, Rule 1.8, comment [3] (recognizing that the same transaction can implicate both rules and require that both consent requirements be satisfied).

<sup>2</sup> As noted above, we have assumed that multiple roles are legally permissible under applicable substantive law and thus need not consider Oregon RPC 1.7(b)(2). And since it is assumed that Lawyer represents Client and only Client, we need not consider Oregon RPC 1.7(b)(3).



- (3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

There is significant overlap between Oregon RPC 1.7(b) and Oregon RPC 1.8(a). For example, both rules would apply whether Lawyer plays the nonlawyer role (or roles) as the owner or co-owner of a non-law business or as an employee or independent contractor for such a business. In addition, both rules require Lawyer to obtain Client's informed consent<sup>3</sup> and to confirm that consent in a contemporaneous writing.<sup>4</sup> See Oregon RPC 1.7(b)(4), 1.8(a)(3).<sup>5</sup> The informed consent requirements under Oregon RPC 1.8(a)(3) are more stringent, however:

- It is not enough that Lawyer confirm Client's waiver by a writing sent by Lawyer, as would be the case under Oregon RPC 1.7., Lawyer must also receive Client's informed consent "in a writing signed by the client."
- Lawyer's writing must clearly and conspicuously set forth each of the essential terms of each aspect of Lawyer's business relations with Client and the role that Lawyer will play in each such regard, as well as the role that Lawyer will play as Client's Lawyer. This would include, for example, the fees that Lawyer or others would earn in each capacity and the circumstances under which each such fee

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<sup>3</sup> Oregon RPC 1.0(g) provides:

"Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct. When informed consent is required by these Rules to be confirmed in writing or to be given in a writing signed by the client, the lawyer shall give and the writing shall reflect a recommendation that the client seek independent legal advice to determine if consent should be given.

<sup>4</sup> Oregon RPC 1.0(b) provides:

"Confirmed in writing," when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. See paragraph (g) for the definition of "informed consent." If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.

<sup>5</sup> For prior formal opinions citing to both Oregon RPC 1.7(a) and Oregon RPC 1.8(a), see OSB Formal Ethics Op Nos 2005-10 (in addition to lawyer's private practice, lawyer also owns a real estate firm and a title insurance company that occasionally do business with lawyer's clients) and 2005-28 (discussing conflict of interest in representing both sides in adoption).

would be payable (*e.g.*, only upon closing or without regard to closing). It would also include a clear explanation of any limitation of liability provisions that might exist regarding Lawyer's other roles.<sup>6</sup>

- In addition to recommending that Client consult independent counsel, Lawyer must expressly inform Client in writing that such consultation is desirable and must make sure that Client has a reasonable opportunity to secure the advice of such counsel.
- Communications between Lawyer and Client as part of their lawyer-client relationship are subject to Lawyer's duties of confidentiality under Oregon RPC 1.6.6. Communications between Lawyer and Client in other capacities would not be subject to Oregon RPC 1.6<sup>7</sup>, and Lawyer must explain to Client why this distinction is potentially significant.<sup>8</sup> This explanation must be given whether

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<sup>6</sup> For cases and ethics opinions discussing the general level of disclosure requirements when lawyers do business with clients, see, for example, OSB Formal Ethics Op No 005-32.

<sup>7</sup> Oregon RPC 1.6 provides:

- (a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).
- (b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
  - (1) to disclose the intention of the lawyer's client to commit a crime and the information necessary to prevent the crime;
  - (2) to prevent reasonably certain death or substantial bodily harm;
  - (3) to secure legal advice about the lawyer's compliance with these Rules;
  - (4) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;
  - (5) to comply with other law, court order, or as permitted by these Rules; or
  - (6) in connection with the sale of a law practice under Rule 1.17 or to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm. . . .

<sup>8</sup> See, *e.g.*, *United States v. Huberts*, 637 F2d 630, 639–640 (9th Cir 1980), cert. denied, 451 US 975

Lawyer's multiple roles are carried out from a single office or from physically distinct offices.<sup>9</sup>

Two requirements remain to be discussed. One requirement is that the terms of the business aspects of the transactions between Lawyer and Client be "fair and reasonable" pursuant to Oregon RPC 1.8(a)(1). We assume that this requirement will be met if Client would be unable to obtain the same services from another under more favorable terms. Whether, or to what extent, the "fair and reasonable" requirement could be met if there were other available suppliers at materially lower cost is a subject on which this Committee cannot define any bright-line rule. Other jurisdictions have been more inclined to approve Lawyers' business relations with Clients when the Client is relatively sophisticated. *See, e.g., Atlantic Richfield Co. v. Sybert*, 441 A2d 1079 (Md Ct Spec App 1982) (lawyers who acted as realty brokers for sophisticated corporate seller were not barred from recovering real estate commission); *McCray v. Weinberg*, 340 NE2d 518 (Mass App Ct 1976) (declining to set aside foreclosure of lawyer's mortgage loan, one of a series, to knowledgeable and experienced client).

The other requirement is that Lawyer must "reasonably believe that [Lawyer] will be able to provide competent and diligent representation to" Client under Oregon RPC 1.7(b)(1). This means not only that Lawyer must have the subjective belief that Lawyer can do so, but also that Lawyer's belief must be objectively reasonable under the circumstances. *See, e.g., RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS* §126, comment e (2000). Other state bar ethics committees have split on whether such an objectively reasonable belief can exist if, for example, a Lawyer wishes to act both as legal counsel to and insurance agent for a Client or as legal counsel to and securities broker for a Client.<sup>10</sup> We cannot say that it will always be unreasonable for a Lawyer to conclude that the Lawyer can provide competent and

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(1981) (lawyer as business agent; no privilege); *United States v. Davis*, 636 F2d 1028, 1043–1044 (5th Cir), cert. denied, 454 US 862 (1981) (lawyer as tax preparer; no privilege); *Diamond v. City of Mobile*, 86 FRD 324, 327–328 (SD Ala 1978) (lawyer as investigator; no privilege); *Neuder v. Battelle Pacific Northwest Nat'l Lab*, 194 FRD 289, 292–297 (DDC 2000) (when corporate lawyer acts in nonlegal capacity in connection with employment decisions, communications between lawyer and corporate representatives not privileged). A variant could arise if Lawyer's role were ambiguous, resulting in Client's inability to carry the burden of proof on lawyer-client privilege. *See Groff v. S.I.A.C.*, 246 Or 557, 565–566, 426 P2d 738 (1967) (person asserting privilege has burden of showing that one asserting privilege and nature of testimony offered are both within ambit of privilege); ORS 40.030(1) (OEC 104(1)).

<sup>9</sup> The explanation about privilege and confidentiality issues might, for example, include a discussion about the effect that a lack of confidentiality could have on an opposing party's ability to call Lawyer as a witness in any subsequent litigation and thus on Lawyer's ability to represent Client in that litigation in light of the lawyer-witness rule, Oregon RPC 3.7.

<sup>10</sup> *See, e.g., Cal Formal Ethics Op No 1995-140* (lawyer as insurance broker); *NYSBA Formal Ethics Op No 2002-752* (lawyer may not provide real estate brokerage services in the same transaction as legal services); *NYSBA Formal Ethics Op No 2005-784* (lawyer also acting in entertainment management role).

diligent legal advice to a Client while also fulfilling other roles. We note, however, that there will be times when the Lawyer's conflicting obligations and interests will preclude such roles. Cf. *In re Phelps*, 306 Or 508, 510 n 1, 760 P2d 1331 (1988) (lawyer cannot be both counsel to a party in a transaction and escrow for that transaction); OSB Formal Ethics Op No 2005-55 (same).

3. *Additional Caveats and Concluding Remarks.*

Given these numerous and delicate potential issues, one might fairly conclude that multidisciplinary practice means having multiple opportunities to be disciplined. See generally *In re Phillips*, 338 Or 125, 107 P3d 615 (2005) (36-month suspension for violation of multiple provisions in former Code of Professional Responsibility in connection with program to help insurance agents sell insurance products to lawyer's estate planning clients and share in resulting commissions). Nevertheless, it will sometimes, but not always, be permissible for Lawyer to play these multiple roles. The answer will depend on factors including the fairness and reasonableness of the multiple roles, whether it is objectively reasonable to believe that Lawyer can provide competent and diligent representation while playing multiple roles, and whether Lawyer can and does obtain Client's informed consent in a writing signed by the Client. Before concluding this opinion, however, we note three caveats:

- If someone other than Client were to pay Lawyer for the provision of legal services to Client, Lawyer would also have to comply with Oregon RPC 1.8(f).<sup>11</sup>
- If Lawyer were to endeavor to use Lawyer's role as real estate broker or agent or mortgage broker or loan officer to obtain clients for Lawyer's practice of law, Lawyer would have to comply with applicable advertising and solicitation requirements in Oregon RPC 7.1 *et seq.*<sup>12</sup>

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<sup>11</sup> Oregon RPC 1.8(f) provides:

A lawyer shall not accept compensation for representing a client from one other than the client unless:

- (1) the client gives informed consent;
- (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and
- (3) information related to the representation of a client is protected as required by Rule 1.6.

For an ethics opinion discussing this rule, see OSB Formal Ethics Op No 2005-30 (legal fees paid by insurer).

<sup>12</sup> For the present text and prior formal ethics opinions addressing these requirements, see OSB Formal Ethics Op Nos 2005-106 (lawyer who purchases tax advice business may not use that business to engage

- Lawyers covered by the Oregon State Bar Professional Liability Fund who do not wish to risk losing potentially available legal malpractice coverage should ~~contact the PLF about exclusions that may apply. review Form ORPC 1 and Exclusions 5 and 8 of the PLF 2006 Claims Made Plan, which can be found at page 66 of the 2006 Oregon State Bar Membership Directory, or any later amendments thereto.~~

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directly or indirectly in improper solicitation of legal clients), 2005-101 (lawyer and psychologist may market a joint “Family Mediation Center”), and 2005-108 (lawyer may advertise family mediation service in marriage and family therapy section of Yellow Pages).

# OREGON STATE BAR

## Board of Governors Agenda

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**Meeting Date:** September 11, 2015  
**Memo Date:** September 10, 2015  
**From:** Kay Pulju, Communications & Public Services Director  
**Re:** Award recommendations for 2015

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### Action Recommended

Approve the slate of nominees for OSB awards in 2015:

President's Membership Service Award

Judith A. Parker  
Simon Whang

President's Public Service Award

Barnes Ellis  
Elizabeth Knight  
Chanpone Sinlapasai

President's Diversity & Inclusion Award

Hon. John Acosta  
Hon. Adrienne Nelson

President's Sustainability Award

Heather Brinton  
Ward Greene  
Kimberlee Stafford

President's Public Leadership Award

Linda Tomassi

Wallace P. Carson, Jr., Award for Judicial Excellence

Hon. Katherine Tennyson

OSB Award of Merit

William A. Barton

President's Special Award of Appreciation\*

Peter Courtney, Floyd Prozanski, Tobias Read and Jennifer Williamson

## **Background**

The ad hoc Awards Committee met by conference call on August 21 to review nomination materials and develop the recommendations detailed above. Members present were: Rich Spier, Guy Greco, Vanessa Nordyke, Ramon Pagán, Tim Williams and Elizabeth Zinser.

\* The President's Special Award of Appreciation is a discretionary award of the President of the OSB, with the concurrence of the board, to be presented to one or more people who have made recent outstanding contributions to the bar, the bench and/or the community. Recipients may be lawyers or non-lawyers. The President will present his or her proposed award recipient to the board at the same time the board considers the bar's other awards.

The annual Awards Luncheon will take place on awards will be presented at a luncheon on December 10 at the Sentinel Hotel in Portland.

September 11, 2015

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Sylvia Stevens, Tigard

**David White**  
Chair, Board of Bar Examiners  
Oregon State Bar  
P. O Box 231935  
Tigard, OR 97281-1935

Re: Appointments to the Board of Bar Examiners

Dear Mr. White:

The Board of Governors welcomes the opportunity to provide input on the recommendations being made by the Board of Bar Examiners (BBX) to the Supreme Court regarding lawyer and public member appointments to the BBX.

The BBX performs two functions vital to the future of the legal profession in Oregon – evaluating the character and fitness of applicants and administering all aspects of the bar examination. We agree that developing an expertise in both realms requires training, knowledge, and experience. We also strongly believe that both processes are enriched by participation from individuals with a diversity of practice experience and demographic backgrounds. In addition, the Oregon State Bar has a longstanding and well-respected tradition of volunteer service by its members – a tradition that should be supported by affording all of its members opportunities to serve.

Acknowledging that lawyer member recommendations are drawn from co-graders, the ability to achieve both practice and demographic diversity is only as broad as the co-grader pool. For that reason, we encourage the BBX to take steps to increase the diversity of the pool of co-graders in 2016. In particular, we recommend the BBX consider including more lawyers: from private practice; from medium or large firms; and from locations outside of the Portland and Salem metropolitan areas.

The most recent volunteer recruitment process has reaped an abundance of lawyers enthusiastic to give something back to the profession through service. This is a terrific development and a wonderful opportunity to expand the diversity of the BBX. We note that a number of the volunteers for the BBX appear to be well-qualified to serve as co-graders. There is also ample time in which to seek and obtain any additional information that would enhance the BBX's ability to meaningfully assess who might be optimal candidates.



Letter to David White  
September 11, 2015

Page 2 of 2

Finally, we encourage the BBX to consider limiting lawyer members to two terms in order to better balance the need to develop expertise with the benefit that new energy and perspective bring.

We value the important work the BBX performs and look forward to working collaboratively toward our shared goal of insuring that Oregon's lawyer admissions process continues to be held in the highest regard for its professionalism, fairness, and efficiency.

Sincerely yours,

A handwritten signature in black ink, appearing to read "R. Spier", with a long horizontal flourish extending to the right.

Richard G. Spier  
President  
Oregon State Bar

cc: Hon. Thomas A. Balmer, Oregon Supreme Court Chief Justice

# Fee ~~Arbitration~~Dispute Resolution Rules

Rules of the Oregon State Bar on Mediation and Arbitration of Fee Disputes

Effective ~~February 2013~~ 2015

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## Section 1 -Purpose

**1.1** The purpose of these Rules is to provide ~~for the arbitration of a~~ voluntary method to resolve fee disputes between active members of the Oregon State Bar maintaining offices in Oregon and their clients; between those members and other active members of the Oregon State Bar, and; between active members of a state bar other than Oregon and their clients who either are residents of the state of Oregon or have their principal place of business in Oregon. Parties who agree to participate in this program expressly waive the requirements of ORS 36.600 to 36.740 to the extent permitted by ORS 36.610 except as specifically provided herein.

## Section 2 ~~-Mediation and Arbitration Panels; Advisory Committee~~

**2.1** ~~General Counsel shall~~The Fee Dispute Resolution Administrator (“Administrator”) shall appoint attorney members to ~~an arbitration panel~~ mediation panels in each board of governors region, from which ~~hearing panels~~ mediators will be selected. The normal term of appointment shall be three years, and a ~~panel member~~ mediation panelist may be reappointed to a further term. All ~~attorney panel members~~ mediation panelists shall be active or active pro bono members in good standing of the Oregon State Bar. ~~Public members~~ with a principal business office in the board of governors region of appointment.

**2.2** The Administrator shall appoint attorney and public members to arbitration panels in each board of governors region, from which arbitrators will be selected ~~from individuals who.~~ The normal term of appointment shall be three years, and an arbitration panelist may be reappointed to a further term. All attorney panelists shall be active or active pro bono members in good standing of the Oregon State Bar with a principal business office in the board of governors region of appointment. All public panelists shall reside or maintain a principal business office in the board of governors region of appointment and ~~who are~~ shall be neither active nor inactive members of any bar.

**2.23** General Counsel shall ~~also~~ appoint an advisory committee consisting of at least one attorney panel member from each of the board of governors regions. The advisory committee shall assist General Counsel and the Administrator with training and recruitment of arbitration and mediation panel members, provide guidance as needed in the interpretation and implementation of the fee ~~arbitration~~ dispute rules, and make recommendations to the board of governors for changes in the rules or program.

## Section 3 ~~Initiation of Proceedings~~Training

~~3.13.1~~ The Oregon State Bar will offer training opportunities to panelists regarding mediation and arbitration techniques and the application of RPC 1.5 in fee disputes.

**3.2** The Administrator may request information about panelists’ prior training and experience and may appoint panelists based on their related training and experience.

## Section 4 Initiation of Proceedings

**4.1** A mediation proceeding shall be initiated by the filing of a written petition and mediation agreement. The mediation agreement must be signed by one of the parties to the dispute and filed

with General Counsel's Office within 6 years of the completion of the legal services involved in the dispute.

**4.2** An arbitration proceeding shall be initiated by the filing of a written petition and ~~an~~ arbitration agreement. The petition must be signed by one of the parties to the dispute and filed with General Counsel's Office within 6 years of the completion of the legal services involved in the dispute.

**4.3.2** Upon receipt of ~~the~~ petition and ~~arbitration~~ agreement(s) signed by the petitioning party, ~~General Counsel's Office~~ the Administrator shall forward a copy of the petition and the ~~original arbitration~~ agreement(s) to the respondent named in the petition by regular first-class mail e-mail or facsimile or by such other method as may reasonably provide the respondent with actual notice of the initiation of proceedings. Any supporting documents submitted with the petition shall also be provided to the respondent. If the respondent desires to submit the dispute to mediation or arbitration, the respondent shall sign the ~~original arbitration~~ agreement(s) and return ~~it~~ the agreement(s) to ~~General Counsel's Office~~ the Administrator within twenty-one (21) days ~~after of~~ receipt. A twenty-one (21) day extension of time to sign and return the petition may be granted by ~~General Counsel~~ the Administrator. Failure to sign and return the ~~arbitration~~ agreement within the specified time shall be deemed a rejection of ~~arbitration~~ the request to mediate or arbitrate.

**4.4** A lawyer who is retained by a client who was referred by the OSB Modest Means Program or OSB Lawyer Referral Program may not decline to arbitrate if such client files a petition for fee arbitration.

**3.34.5** If the respondent agrees to mediate or arbitrate, ~~General Counsel's Office~~ the Administrator shall notify the petitioner who shall, within twenty-one (21) days of the mailing of the notice, pay a filing fee of \$~~5075~~ for claims of less than -\$7500 and \$~~75100~~ for claims of -\$7500 or more. The filing fee may be waived at the discretion of ~~General Counsel~~ the Administrator based on the submission of a statement of the petitioner's assets and liabilities reflecting inability to pay. The filing fee shall not be refunded ~~if the dispute is settled prior to the issuance of an award or if the parties agree to withdrawal of the petition~~, except on a showing satisfactory to General ~~Counsel's Office~~ Counsel of extraordinary circumstances or hardship.

**3.4.6** If ~~arbitration~~ the request to mediate or arbitrate is rejected, ~~General Counsel's Office~~ the Administrator shall notify the petitioner of the rejection and of any stated reasons for the rejection.

**3.54.7** The petition, mediation agreement, arbitration agreement and statement of assets and liabilities shall be in the form prescribed by General Counsel, provided however, that ~~the agreement~~ mediation and arbitration agreements may be modified with the consent of both parties and the approval of General ~~Counsel's Office~~ Counsel.

**3.64.8** After the parties have signed ~~the a~~ mediation or arbitration agreement ~~to arbitrate~~, if one party requests that ~~the a~~ mediation or arbitration proceeding not continue, ~~General Counsel's Office~~ the Administrator shall dismiss the proceeding. A dismissed proceeding will be reopened only upon agreement of the parties or receipt of a copy of an order compelling arbitration pursuant to ORS 36.625.

## Section ~~45~~45 Amounts in Dispute

~~45.1~~45.1 Any amount of fees or costs in controversy may be mediated or arbitrated. The ~~arbitrator(s)~~ may award interest on the amount awarded as provided in a written agreement between the parties or as provided by law, but shall not award attorney fees or costs incurred in the arbitration proceeding. ~~General Counsel's Office~~Administrator may decline to mediate or arbitrate cases in which the amount in dispute is less than \$250.00.

~~45.2~~45.2 The sole issue to be determined in all ~~arbitration~~fee dispute proceedings under these rules shall be whether the fees or costs charged for the services rendered were reasonable in light of the factors set forth in RPC 1.5. ~~Arbitrators may receive any evidence relevant to a determination under this Rule, including evidence of the value of the lawyer's services rendered to the client. An attorney shall not be awarded more than the amount for services billed but unpaid. A client shall not be awarded more than the amount already paid, and may also be relieved from payment of services billed and remaining unpaid.~~

## Section ~~5-6~~5-6 Selection of Mediators and Arbitrators

~~5.1~~6.1 Each party to a mediation shall receive with the petition and mediation agreement a list of the members of the mediation panel from the board of governors region in which a lawyer to the dispute maintains his or her law office.

~~6.2~~6.2 Each party to an arbitration shall receive with the petition and arbitration agreement a list of the members of the arbitration panel ~~having jurisdiction over the dispute. The arbitration panel having jurisdiction over a dispute shall be that of~~in the board of governors region in which ~~the~~ lawyer to the dispute maintains his or her law office, ~~unless the parties agree that the matter should be referred to the panel of another board of governors region.~~

~~5.26.3~~6.3 Each party may challenge without cause, and thereby disqualify as mediators or arbitrators, not more than two ~~members of the panel~~panelists. Each party may also challenge any ~~member of the panel~~panelist for cause. Any challenge for cause must be made by written notice to ~~General Counsel~~the Administrator, shall include an explanation of why the party believes the party cannot have a fair and impartial hearing before the ~~member~~panelist, and shall be submitted ~~along~~with the ~~Petition and Agreement~~required fee. Challenges for cause shall be determined by General Counsel, based on the reasons offered by the challenging party. Upon receipt of the agreement signed by both parties, the Administrator shall select the appropriate number of panelists from the list of unchallenged panelists to hear a particular dispute.

~~5.3~~6.4 All mediations shall be mediated by one lawyer panelist selected the board of governors region in which a lawyer to the dispute maintains his or her law office. ~~The Administrator shall give the parties, General Counsel shall select the appropriate number of arbitrators from the list of unchallenged members-~~ notice of the panel to hear a particular dispute.~~mediator's appointment.~~

~~6.5~~6.5 Disputed amounts of less than ~~\$7,500~~\$10,000 shall be arbitrated by one ~~panel member~~lawyer panelist. Disputed amounts of ~~\$7,500~~\$10,000 or more shall be arbitrated by three ~~panel members~~ (subject to Rule 5.4).~~panelists, including two lawyer arbitrators and one public arbitrator.~~ If three

(3) arbitrators are appointed, ~~General Counsel~~ the Administrator shall appoint one lawyer ~~member~~ arbitrator to serve as chairperson. ~~Notice of appointment shall be given by the General Counsel~~ The Administrator shall appoint panelists from the board of governors region in which a lawyer to the dispute maintains his or her law office. The Administrator shall give notice of appointment to the parties. ~~of the appointment.~~ Regardless of the amount in controversy, the parties may agree that one lawyer arbitrator hear and decide the dispute.

~~5.4~~ If three arbitrators cannot be appointed in a ~~particular case~~ fee dispute from the arbitration panel of the board of governors region in which a dispute involving ~~\$7,500~~ 10,000 or more is pending, the dispute shall be arbitrated by a single arbitrator. If, however, any party files a written objection with ~~General Counsel~~ the Administrator within ten (10) days after receiving notice that a single arbitrator will be appointed under this subsection, two (2) additional arbitrators shall be appointed, ~~under the procedures set out in subsection 5.5.~~

~~5.5.6~~ Any change or addition in appointment of mediators or arbitrators shall be made by ~~General Counsel~~ the Administrator. ~~When appropriate,~~ When necessary, the Administrator may appoint mediators or arbitrators can be appointed by the General Counsel from the arbitration panel of a different board of governors region. When necessary, General Counsel may also select a region other arbitrators, provided that than the board of governors region in which a lawyer members are active members in good standing of to the Oregon State Bar, ~~dispute maintains his or her law office.~~

~~5.6.7~~ Before accepting appointment, ~~an~~ a mediator or arbitrator shall disclose to the parties and, if applicable, to the other arbitrators, any known facts that a reasonable person would consider likely to affect the impartiality of the mediator or arbitrator in the proceeding. ~~Arbitrators~~ Mediators and arbitrators have a continuing duty to disclose any such facts learned after appointment. After disclosure of facts required by this rule, the mediator or arbitrator may be appointed or continue to serve only if all parties to the proceeding consent; in the absence of consent by all parties, ~~General Counsel's Office~~ the Administrator will appoint a replacement mediator or arbitrator and, if appropriate, extend the time for the hearing.

6.8 In the absence of consent by all parties, no person appointed as a mediator may thereafter serve as an arbitrator for the same fee dispute.

### **Section ~~6-7~~ Mediation**

7.1 The mediator shall arrange a mutually agreeable date, time and place for the mediation. The mediator shall provide notice of the mediation date, time and place to the parties and to the Administrator not less than 14 days before the mediation, unless the notice requirement is waived by the parties.

7.2 The mediation shall be held within ninety (90) days of appointment of the mediator by the Administrator. Upon request of a party, or upon his or her own determination, the mediator may adjourn, continue or postpone the mediation as the mediator determines necessary.

7.3 Any communications made during the course of mediation are confidential to the extent provided by law. ORS 36.220. Mediations are not public meetings; the mediator has the sole discretion to allow persons who are not parties to the mediation to attend the proceedings.

7.4 If the parties reach a settlement in mediation, the mediator may draft a settlement agreement consistent with RPC 2.4 to memorialize the parties' agreement.

7.5 At the conclusion of the mediation, the mediator shall notify the Administrator if the fee dispute was resolved. The mediator shall not provide a copy of the settlement agreement to the bar.

### **Section 8 Arbitration Hearing**

~~68.1~~ The chairperson or sole arbitrator~~(s) appointed~~ shall determine a convenient time and place for the arbitration hearing to be held. The chairperson or ~~single~~sole arbitrator shall provide written notice of the hearing date, time and place to the parties and to ~~General Counsel's Office~~the Administrator not less than 14 days before the hearing. Notice may be provided by regular first class mail, e-mail, or facsimile or by such other method as may reasonably provide the parties with actual notice of the hearing. Appearance at the hearing waives the right to notice.

~~68.2~~ The arbitration hearing shall be held within ninety (90) days after appointment of the arbitrator(s) by ~~General Counsel~~Administrator, subject to the authority granted in subsection ~~68.3~~.

~~68.3~~ The arbitrator or chairperson may adjourn the hearing as necessary. Upon request of a party to the arbitration for good cause, or upon his or her own determination, the presiding arbitrator ~~or chairperson~~ may postpone the hearing from time to time.

~~68.4~~ Arbitrators shall have those powers conferred on them by ORS 36.675. The chairperson or the sole arbitrator shall preside at the hearing. The chairperson or the sole arbitrator may receive any evidence relevant to a determination under Rule 5.2, including evidence of the value of the lawyer's services rendered to the client. He or she shall be the judge of the relevance and materiality of the evidence offered and shall rule on questions of procedure. He or she shall exercise all powers relating to the conduct of the hearing, and conformity to legal rules of evidence shall not be necessary. Arbitrators shall resolve all disputes using their professional judgment concerning the reasonableness of the charges made by the lawyer involved.

~~68.5~~ The parties to the arbitration are entitled to be heard, to present evidence and to cross-examine witnesses appearing at the hearing. Any party to an arbitration may be represented at his or her own expense by a lawyer at the hearing or at any stage of the arbitration.

~~68.6~~ On request of any party to the arbitration or any arbitrator, the testimony of witnesses shall be given under oath. When so requested, the chairperson or sole arbitrator may administer oaths to witnesses testifying at the hearing.

~~68.7~~ Upon request of one party, and with consent of both parties, the panel or sole arbitrator may decide the dispute upon written statements of position and supporting documents submitted by each party, without personal attendance at the arbitration hearing. The chairperson or sole arbitrator may also allow a party to appear by telephone if, in the sole discretion of the chairperson or sole arbitrator, such appearance will not impair the ability of the arbitrator(s) to determine the matter. The party desiring to appear by telephone shall bear the expense thereof.

~~68.8~~ If any party to an arbitration who has been notified of the date, time and place of the hearing but fails to appear, the chairperson or sole arbitrator may either postpone the hearing or proceed



with the hearing and determine the controversy upon the evidence produced, notwithstanding such failure to appear.

**68.9** Any party may have the hearing reported at his or her own expense. In such event, any other party to the arbitration shall be entitled to a copy of the reporter's transcript of the testimony, at his or her own expense, and by arrangements made directly with the reporter. As used in this subsection, "reporter" may include an electronic reporting mechanism.

**68.10** If during the pendency of an arbitration hearing or decision the client files a malpractice suit against the lawyer, the arbitration proceedings shall be either stayed or dismissed, at the agreement of the parties. Unless both parties agree to stay the proceedings within 14 days of the arbitrator's receipt of a notice of the malpractice suit, the arbitration shall be dismissed.

### Section ~~7-9~~ Arbitration Award

**79.1** An arbitration award shall be rendered within thirty (30) days after the close of the hearing unless General Counsel, for good cause shown, grants an extension of time.

**79.2** The arbitration award shall be made by a majority where heard by three members, or by the sole arbitrator. The award shall be in writing and signed by the members concurring therein or by the sole arbitrator. The award shall state the basis for the panel's jurisdiction, the nature of the dispute, the amount of the award, if any, the terms of payment, if applicable, and an opinion regarding the reasons for the award. Awards shall be substantially in the form shown in Appendix A. An award that requires the payment of money shall be accompanied by a separate statement that contains the information required by ORS 18.042 for judgments that include money awards.

**9.3** Arbitrator(s) may award interest on the amount awarded as provided in a written agreement between the parties or as provided by law, but shall not award attorney fees or costs incurred in the fee dispute proceeding. An attorney shall not be awarded more than the amount for services billed but unpaid. A client shall not be awarded more than the amount already paid, and may also be relieved from payment of services billed and remaining unpaid.~~7-3~~

**9.4** The original award shall be forwarded to ~~General Counsel~~the Administrator, who shall mail certified copies of the award to each party to the arbitration. ~~General Counsel~~The Administrator shall retain the original award, together with the original fee dispute agreement ~~to arbitrate~~. Additional certified copies of the agreement and award will be provided on request. The OSB file will be retained for six years after the award is rendered; thereafter it may be destroyed without notice to the parties.

**7-49.5** If a majority of the arbitrators cannot agree on an award, they shall so advise ~~General Counsel~~the Administrator within 30 days after the hearing. ~~General Counsel~~The Administrator shall resubmit the matter, de novo, to a new panel within thirty days.

**7-59.6** The arbitration award shall be binding on both parties, subject to the remedies provided for by ORS 36.615, 36.705 and 36.710. The award may be confirmed and a judgment entered thereon as provided in ORS 36.615, 36.700 and ORS 36.715.

**9.7.6** Upon request of a party and with the approval of General Counsel for good cause, or on General Counsel's own determination, the arbitrator(s) may be directed to modify or correct the

award for any of the following reasons:

- a. there is an evident mathematical miscalculation or error in the description of persons, things or property in the award;
- b. the award is in improper form not affecting the merits of the decision;
- c. the arbitration panel or sole arbitrator has not made a final and definite award upon a matter submitted; or
- d. ~~or~~ to clarify the award.

### **Section 8—Public Records and Meetings**10 Confidentiality

**810.1** The arbitration~~resolution~~ of a fee dispute through ~~General Counsel's Office~~the Oregon State Bar Fee Dispute Resolution Program is a private, contract dispute resolution mechanism, and not the transaction of public business.

**810.2** Except as provided in paragraph **810.4** below, or as required by law or court order, all electronic and written records and other materials submitted by the parties to General Counsel's Office, or to the arbitrator(s), mediators or arbitrators, and any award rendered by the arbitrator(s), shall not be subject to public disclosure, unless all parties to an arbitration agree otherwise. ~~General Counsel~~The Oregon State Bar considers all electronic and written records and other materials submitted by the parties to General Counsel's Office, or to the arbitrator(s), mediators or arbitrators, to be submitted on the condition that they be~~are~~ kept confidential.

~~8.3 Arbitration~~**10.3 Mediations and arbitration** hearings are closed to the public, unless all parties agree otherwise. Witnesses who will offer testimony on behalf of a party may attend ~~the~~an arbitration hearing, subject to the chairperson's or sole arbitrator's discretion, for good cause shown, to exclude witnesses.

**810.4** Notwithstanding paragraphs **810.1**, **810.2**, and **810.3**, lawyer mediators and arbitrators shall inform the Client Assistance Office when they know, based on information obtained during the course of an arbitration proceeding, that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects.

**810.5** Notwithstanding paragraphs ~~8.1, 810.1, 10.2,~~ and **810.3**, and **810.4**, all electronic and written records and other materials submitted to General ~~Counsel~~Counsel's Office or to the arbitrator(s), mediators or arbitrators during the course of the proceeding, and any award rendered by the arbitrator(s), shall be made available to the Client Assistance Office and/or Disciplinary Counsel for the purpose of reviewing any alleged ethical violation in accordance with BR 2.5 and BR 2.6.

**810.6** Notwithstanding paragraphs **810.1**, **810.2**, **810.3** and **810.4**, General ~~Counsel~~Counsel's Office may disclose to the Client Assistance Office or to Disciplinary Counsel, upon the Client Assistance Office's or Disciplinary Counsel's request, whether a fee arbitration~~dispute resolution~~ proceeding involving a particular

lawyer is pending, the current status of the proceeding, and, at the conclusion of ~~the~~  
an arbitration proceeding, in whose favor the arbitration award was rendered.

**810.7** Notwithstanding paragraphs 810.1, 810.2 and 810.3, if any lawyer whose employment was secured through the Oregon State Bar Modest Means Program or Lawyer Referral Program refuses to participate in fee arbitration, ~~General Counsel~~the Administrator shall notify the administrator of such program(s).

**10.8** Mediators and parties who agree to participate in this program expressly waive the confidentiality provisions of ORS 36.222 to the extent necessary to allow disclosures pursuant to Rule 7.5, 10.4, 10.5 and 10.6.

#### **Section ~~9~~11 Immunity and Competency to Testify**

**911.1** Pursuant to ORS 36.660, arbitrators shall be immune from civil liability to the same extent as a judge of a court of this state acting in a judicial capacity. All other provisions of ORS 36.660 shall apply to arbitrators participating in the Oregon State Bar ~~fee arbitration~~dispute resolution program.

**Appendix A**

**Oregon State Bar  
Fee Arbitration**

) Case No.

Petitioner )

v. )

) Arbitration Award

)

Respondent )

**Jurisdiction**

**Nature of Dispute**

**Amount of Award**

**Opinion**

**Award Summary**

The arbitrator(s) find that the total amount of fees and costs that should have been charged in this matter is: \_\_\_\_\_ \$

~~of fees and costs that should have been charged~~  
~~in this matter is: \_\_\_\_\_ \$~~

Of which the Client is found to have paid: \$

For a net amount due of: \_\_\_\_\_ \$

Accordingly, the following award is made: \$

Client shall pay Attorney the sum of: \_\_\_\_\_ \$

**(or)**

Attorney shall refund to Client the sum of: \$

**(or)**

Nothing further shall be paid by either attorney or client.

/Signature(s) of Arbitrator(s)

# OREGON STATE BAR

## Governance and Strategic Planning Committee Agenda

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**Meeting Date:** September 11, 2015  
**From:** Sylvia E. Stevens, Executive Director  
**Re:** ABA On-line Pro Bono Program

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### Issue

The American Bar Association Pro Bono Committee wants to build and maintain a fifty state interactive pro bono website that low-income persons can long onto, pose legal questions and get answers from volunteer lawyers licensed in the state in which the person resides. The ABA would like a decision from the OSB whether it wants to participate by November 15.

### Background

For a complete history of this project, please see the attached memo from the ABA Pro Bono Committee, and a review by George T. “Buck” Lewis, a partner at Baker Donelson, the firm leading the fundraising efforts for the undertaking, and the Chair of the ABA Pro Bono Committee’s Technology Sub-committee. The site will be paid for by private fundraising, and may also include a nominal yearly fee of between \$1,000 and \$2,500 per year. The OSB would be expected to engage in volunteer recruitment, some local site overview (such as a weekly review for unanswered questions—forwarding those questions to identified volunteers), and marketing of the site to the public. The ABA, through its private fundraising, would pay for site maintenance, programming, hosting, security, etc.

Bar staff Cathy Petrecca, Pro Bono Coordinator, attended a webinar on the site and has also forwarded to Mr. Lewis questions raised by the Pro Bono Committee. The OSB Pro Bono Committee has not yet had a chance to vote on whether or not to support this concept, but will do so prior to the next BOG meeting.

This program is modeled on a site launched by the Tennessee Bar Association and the Tennessee Alliance for Legal Services in 2011, with approximately 100 volunteers. Since that time, they’ve answered over 8,000 questions. Unsurprisingly, in Tennessee they’ve found that 40 to 60% of the questions are family law questions. Recruiting volunteers has not been a problem and experience has shown them that this program is a good gateway for volunteers, rather than a cannibalization of existing volunteers from other programs.

Generally, the site is straightforward: after a series of eligibility questions, an eligible user posts a legal question. Volunteers review the questions (which can be sorted by the volunteer into areas of law; alternatively, the volunteer can request that queries in certain areas of law be emailed to him/her), decide whether to take on that question, and then engage with the user. The volunteer lawyer and user/client determine whether the question and answer develops into a dialogue. Users/clients are forewarned that this is not meant to evolve into a long term lawyer/client relationship.

Users who do not qualify (the ABA plans to set the eligibility qualifications at 250% of federal poverty guidelines) are informed of alternatives identified by the OSB, such as the lawyer referral service, self-help materials, etc.

For those attorneys who do not have PLF, NLADA will provide free coverage for attorneys while they are on-site doing work. Coverage would stop if they go off-line and develop an on-going relationship with the client.

The national site will require the identification of the opposing party for attorneys to do a conflict check.

Tennessee estimates that one staff member spends about three to five hours a week on the program, reviewing the questions, emailing volunteers, reviewing data, etc. The ABA expects to be able to provide metrics by legal categories for each state.

Anyone interested in reviewing the Tennessee site can find it at [www.ONLINETNJJUSTICE.org](http://www.ONLINETNJJUSTICE.org). Similar sites may be found at [www.Alabamalegalanswers.org](http://www.Alabamalegalanswers.org); [www.Indianalegalanswers.org](http://www.Indianalegalanswers.org); [www.MNlegaladvice.org](http://www.MNlegaladvice.org); [www.SClawanswers.org](http://www.SClawanswers.org) and [www.WVonlinelegal.org](http://www.WVonlinelegal.org).

Attached documents include the two memos from Mr. Lewis, the proposed contract, and a letter from the President of the LSC supporting the program.

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# OREGON STATE BAR

## Board of Governors Agenda

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**Meeting Date:** September 11, 2015  
**Memo Date:** August 27, 2015  
**From:** Danielle Edwards, Director of Member Services  
**Re:** Appointments to the HOD an UPL Committee

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### Action Recommended

The following bar groups have vacant seats. Consider appointments to these groups as requested by the committee officers and staff liaisons.

### Background

#### House of Delegates

Region 1 member, **David M. Rosen** (101952), resigned his position on the HOD when he became Deschutes County Bar President. His term in that position recently ended and he is seeking appointment to a vacant region 1 HOD seat.

Region 5 public member, **Paresh Patel**, is requesting reappointment to the House of Delegates. Mr. Patel is the founder and CEO of a payment technology business in Portland and chairman of the Pacific NW Federal Credit Union.

**Recommendations:** David M. Rosen, region 1 delegate, term expires 4/16/2018

Paresh Patel, region 5 public member, term expires 4/17/2017

#### Unlawful Practice of Law Committee

One member resigned from the UPL Committee and the officers and staff recommend the appointment of **Jacob Kamins** (094017). The committee is in need of a prosecutor and Mr. Kamins is with the Benton County DA's Office.

**Recommendation:** Jacob Kamins, member, term expires 12/31/2018

**Haskins, Paul, Editor. The Relevant Lawyer: Reimagining the Future of the legal Profession**

A project of the ABA Standing Committee on Professionalism

Introduction:

For the legal profession to endure, lawyer professionalism must endure, in particular access to justice. Navigating the future requires careful thought about the dynamic forces and trends that will shape it. Authors give outward and prospective perspectives on the rapidly changing legal services landscape.

Twenty chapters in five clusters:

I. Transformation

1. "Saving Atticus Finch: The Lawyer and the Legal Service Revolution." Accommodate new forms of legal service delivery.
2. "The Legal Industry of Tomorrow Arrived Yesterday: How Lawyers Must Respond." Regulate legal services in new areas while removing constraints that obstruct progress.
3. "Alternative Legal Service Providers: Filling the Justice Gap." The Limited License Legal Services Technician (LTTT) in Washington State.
4. "Client Change: The Age of Consumer Self-Navigation." Embrace the reality of new toolboxes; work with clients to sort out what they can do, and what the lawyer should do.

II. Equity

5. "Women Lawyers: Big Firm Attrition—Small Firm Gains." Women lawyers find structural and cultural barriers in large firms but opportunities for satisfaction and balance in small firms.
6. "Diversity and Inclusion as Filters for Envisioning the Future." Inclusive thinking and acting will become a successful lawyer's core competency—essential to success in practice and life.

III. Practice Settings

7. "The Future of Virtual Law Practice." Internet-based technology will help firms to offer efficient and affordable solutions and play a major part in reducing the access to justice gap.
8. "Large Law Firms: A Business Model, a Service Ethic." Mastering technology, business sophistication, and global markets will drive profitability by serving clients and society better.
9. "Indie Lawyering." A solo practice pathway is emerging as consumers seek individualized, community-centered & sustainable products; lift barriers to interstate practice and advertising.
10. "The Soldier-Lawyer and the Challenge of Perceiving Right Action." The nature of world conflicts requires military lawyers to apply professional expertise and organizational & national values.

IV. Regulation

11. "The Shift to Institutional Law Practice." Regulatory reform needs to register and discipline practices (not just individuals), lower practice barriers, allow non-lawyers to invest in law firms.
12. "Globalization and Regulation." Regulatory reform likely will include expansion to all legal service providers, less focus on geography in virtual practice world, rationalization of systems.
13. "A Sea Change in England." The impacts of regulatory reform in 2007 that allows up to 25% of legal services by non-lawyers and permits "alternative business practices" suggest that the future belongs to firms open to innovation and adaptation.
14. "The Australian Experiment: Out with the Old, in with the Bold." Regulatory change focused on an institution's versus an individual's conduct saw a dramatic drop in disciplinary complaints.
15. "Canada: The Road to Reform." Reforms include new regulations allowing lawyers to do work in other provinces and to serve clients from other provinces for up to 100 days/year.



## V. Development

16. "Legal Education: Learning What Lawyers Need." Law school and continuing education must adapt with emphasis on practical skills, accreditation/regulation flexibility to encourage specialized and innovative programs, and alignment of cost with lawyer compensation.
17. "Mentoring: No App for That." Only face-to-face mentoring by experienced lawyers can help new generations of lawyers to emerge professionally; the need is intensifying.
18. "Social Media: Here Today, Here Tomorrow." Can promote practice, enhance legal skills and professional network, and strengthen cases. Avoid embarrassment; evolve ethical rules.
19. "Professionalism as Survival Strategy." Professionalism principles and programs must prevail through all the disruptive changes for the legal profession's identity to endure as '...the force that advances the rule of law and brings order to society and commerce...'
20. "Bar Associations: Tapping the Wisdom of the Young." Engage and give meaningful roles more quickly to younger lawyers, use technology; retool the business of bars to address rising risks.

## TRANSFORMATION

**Chapter 1: "Saving Atticus Finch: The Lawyer and the Legal Services Revolution," by Frederic S. Ury. Former President of National Conference of Bar Presidents, member ABA Commission on Legal Ethics 20/20, and chair of ABA Committee on Professionalism.**

Ury Argued: The legal profession is in the midst of disruptive change and must adapt.

- Atticus Finch represented the model country lawyer whose profession was more of a calling than a business, and he had the respect of the whole community. The legal profession must remain just that – a profession.
- But, to remain primarily self-regulated it must adapt to the disruptive forces of change.
- Legal business model is dying.
- We have an oversupply of lawyers when 85 % of people with legal problems either can't afford or don't know they need legal services.
- Lawyers need to lead and the Bar needs to take bold action to establish the direction of legal services in the new global economy of fading borders and when technology equals power.
- Technology has increased the pace of practice and clients insist on 24/7 accessibility.
- The future depends on how much value lawyers can add to the Internet no-cost forms and advice.
- Internet services will become more robust as artificial intelligence technologies are introduced.
- Non-lawyer ownership of firms is nothing new, i.e. Axiom and law offices captive to a single client large insurance company.
- Internet-Centered Economy: Legal service providers are accessible, inexpensive and easy to use, and are owned by non-lawyers.
  - Not just commoditized services but dispute resolution websites owned by non-lawyers.
  - Lawyers compete with a disadvantage – they don't have access to venture capital and are constrained by outdated regulations.
- The control of legal work for many corporations has shifted to in-house counsel, legal outsourcing, and online dispute resolution to reduce costs.
- Risk of Losing the Right to Self-Regulate: While physicians and accountants are heavily regulated by government agencies, lawyers are in the last of the self-regulated professions.

- Hold on to the capacity to control the destiny of the profession or it will be lost.
- Key dangers:
  - Failure to participate
  - Looking the other way
  - Continuing in “our graceful state of monopoly

#### Ury Proposed:

1. Regulate entities rather than individual lawyers.
2. Permit and enable multidisciplinary practices that provide consumers one-stop shopping.
3. In stages, allow non-lawyer ownership of firms, i.e. by computer and social network experts.
4. License and regulate paralegals/legal technicians to provide commoditized work at lower cost, independent of attorneys.
5. Establish a 2-year master’s degree in law practice between a paralegal and a Juris Doctorate.
6. Make ABA/AALS accreditation requirements flexible enough to permit law schools to experiment with different kinds of programs and to differentiate themselves.

#### Concluding assertions:

- Only the profession of law safeguards the rights of ALL of our citizens. [Reaction: A justified claim]
- *Law has a history of achievement that cannot be matched by any other profession or business.*  
[Reaction: Very subjective and unwise assertion; unnecessarily elitist; *graceful state of monopoly?*]

### **Chapter 2: “The Legal Industry of Tomorrow Arrived Yesterday: How Lawyers Must Respond” by Stephen Gillers. Law Professor, NYU; author of casebook Regulation of Lawyers, 10<sup>th</sup> ed. 2015**

Gillers Argued: Information technology and global trade are disrupting the business of law.

- The “geocentric” model for regulating lawyers can’t survive.
  - The focus of much practice is federal law which is little tested on state bar exams.
  - Differences in state law are less pronounced.
  - Specialization rather than local license is the defining credential.
  - Cyberspace enables lawyers anywhere to counsel clients anywhere easily and cheaply and to access libraries and documents from anywhere.
  - Physical office space is less important; some bar ethics opinions recognize virtual law offices
- Exclusivity of the traditional law firm is vanishing.
  - No longer are traditional law firms the only ones to offer legal services for profit.
  - Axiom and others offer experienced lawyers on an ‘as-needed’ basis to corporate clients, the lawyers working from home with proprietary software.
  - They can raise money in capital markets but traditional firms cannot.
- Lawyers are becoming invisible, such as via LegalZoom and Rocket Lawyer offering complex products enabling consumers to generate a form on line for tasks requiring legal knowledge.
  - These websites do not name the lawyers who contribute.
  - The companies are largely unregulated.
- Many legal services are form-driven, prompting the emergence of legal technicians, and Washington State’s experiment with Limited License Legal Technicians.
- Another new entrant is the legal process outsourcing, LPOs (Pangea3 and Integreon) sending work off for inexpensive legal service by persons who may not be admitted to a U.S. bar or any bar.

- Insularity and denial threaten the profession's values and impedes progress for access to justice.
- For the most part lawyers regulate lawyers. Deference to the Bar makes sense when rules are in the spirit of public service. Sometimes, however, rules or resistance to rules are driven by self-interest rather than client interest. Examples:
  - Support of minimum-fee schedules which impeded competition.
  - Opposition to mandatory malpractice insurance, claiming cost would increase fees.
  - Resistance to a rule that would require non-contingency fee agreements be in writing.
- Predictions are made on the floors of Houses of Delegates with no empirical support.
- The profession has lacked leadership in the face of change. Examples of interest group politics and institutional capture of the regulator by the regulated:
  - Lawyers trying (unsuccessfully) to restrict the Supreme Court's holding that legal advertising enjoys commercial speech protection.
  - ABA and 48 bars challenged the efforts of unions and other large organizations to use the purchasing power of members to lower legal fees for routine services.

#### Gillers Proposed:

1. Reexamine rules on cross-border practice, looking at more liberal rules of Canada and the EU.
2. Push all states to implement rules to reflect what lawyers actually do in our national legal economy, as the ABA Multijurisdictional Practice Commission proposed at the turn of the 21<sup>st</sup> Century.
3. Conduct more study to identify the conditions under which lawyers should be permitted to eliminate physical office and practice in VLOs.
4. Develop rules that permit LLLTs to practice, balancing the goal of competence with the needs of those now priced out of the legal marketplace.
  - a. Conduct studies to calibrate proper scope of work of LLLTs
  - b. Define the education and testing requirements for LLLTs
5. Enact rules that regulate the document production companies, so risks are managed while facilitating access to legal knowledge at low cost.
6. Either through legislation or court rule, protect clients who turn to litigation funders.
  - a. The lawyer may have conflicts of interest in advising a client objectively about a funder.
  - b. Set limits on how much a funder can earn in personal injury actions, much like limits on contingency fees.
7. Rather than changing only in reluctant response to realities or external pressures (i.e., lawmakers filling the void), bars should lead change thereby protecting the tradition of judicial authority that insulates the legal profession from political influence.